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TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 435

BOWMAN DAIRY COMPANY, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND WILLIS L. HOTCHKISS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

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BOWMAN DAIRY COMPANY, ET AL.,

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UNITED STATES OF AMERICA AND WILLIS L. HOTCHKISS,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 10080

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

BOWMAN DAIRY COMPANY, ET AL.,
Defendants.

Appeal of:

WILLIS L. HOTCHKISS.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

USCA 2204 The Gunthorp-Warren Printing Co., Chicago—4-17-50—50

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 174th Year

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Esquire, Marshal.

Thursday, January 5, 1950.

Court met pursuant to adjournment.

Present: Honorable John P. Barnes, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

United States of America, *Plaintiff*, *vs.* Bowman Dairy Company; American Processing and Sales Company; Beloit Dairy Company; The Borden Company; Capitol Dairy Company; Hunding Dairy Company; Meadowmoor Dairies, Inc.; Western United Dairy Co.; William R. Boruszak; Hyman I. Freed; H. H. Inglehart; Walter F. Kettell; O. N. Koenig; Francis H. Kullman, Jr.; S. D. McGuire; D. Cameron Peck; and O. O. Smaha, *Defendants.*	No. 48 CR 360.

Be It Remembered, that, on to-wit, the 30th day of July, 1948, the above-entitled action was commenced by the filing of the following Indictment in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-Cr.-360) * *

INDICTMENT.

The Grand Jury Charges:

I. The Defendants.

1. The following corporations are hereby indicted and made defendants herein. Each is engaged in the business of purchasing milk and in the processing and sale of fluid milk to wholesale customers and other purchasers in the Chicago area and its vicinity:

(a) Bowman Dairy Company is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Bowman."

(b) The Borden Company is a corporation organized and existing under the laws of the State of New Jersey with offices and principal place of business in New York, New York. It is hereinafter referred to as "Borden."

4 (c) Beloit Dairy Company is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Beloit."

(d) Capitol Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Capitol."

(e) American Processing and Sales Company is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business in Chicago, Illinois. Its name, prior to some time in 1943, was Hawthorn-Mellody Farms Dairy, Inc. It is hereinafter referred to as "Hawthorn."

(f) Hunding Dairy Company is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Hunding."

(g) Meadowmoor Dairies, Inc. is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business at Chicago, Illinois. It is hereinafter referred to as "Meadowmoor."

(h) Western United Dairy Co. is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business at Chicago, Illinois. It is hereinafter referred to as "Western United."

2. The following natural persons are hereby indicted and made defendants herein. Each is, or within the three years next preceding the date of this indictment has been, associated with or employed by a defendant corporation and holds, or within said three year period has held, the official title or position therewith shown below:

Name	*Address*	*Title*	*Corporation*
William R. Boruszak	1369 Hyde Park Blvd. Chicago, Illinois	Vice-President and Director	Western United
Hyman I. Freed	106 S. Menard Avenue, Chicago, Illinois	Chairman of the Board and Director	Capitol
H. H. Inglehart	103 Washington Blvd., Oak Park, Illinois	General Sales Manager and Director, Chicago Milk Division	Borden
Walter F. Kettel	908 S. Prospect Ave., Park Ridge, Illinois	Sales Manager, Central Wholesale Division	Bowman
O. N. Koenig	5700 N. Kimball Ave., Chicago, Illinois	Vice President and Director, Chicago Milk Division	Borden
Francis H. Kullman, Jr.	2723 Simpson Street Evanston, Illinois	Vice-President and Director	Bowman
S. D. McGuire	Drake Hotel, East Lake Shore Drive and North Michigan Ave., Chicago	President	Beloit
D. Cameron Peck	1233 Crain Street, Evanston, Illinois	Vice-President and Director	Bowman
O. O. Smaha	5550 Kenmore Avenue, Chicago, Illinois	Executive Vice-President and Director, Chicago Milk Division	Borden

3. Wherever in this indictment it is alleged that any corporate defendant did any act or thing, such allegation shall be deemed to mean that such act was performed by the officers, agents, or employees of said corporate defendant, including the natural persons named herein as defendants.

II. Definitions.

4. Wherever the words "fluid milk" are used in this indictment, they are meant to signify and include cow's milk produced for sale and used for consumption in fluid form as whole milk.

6 5. As used in this indictment, the word "distributor" is meant to signify a person, firm, or corporation engaged in the business of pasteurizing, bottling, and distributing fluid milk.

6. Wherever the word "vendor" is used, it shall mean a person, firm, or corporation engaged in the business of buying fluid milk from a distributor for resale, in whole or in part, to wholesale customers or others.

7. As used herein, the term "wholesale customers" means those customers for fluid milk who buy from a distributor or from a vendor of a distributor for resale to consumers and also means those public institutions named hereinafter in paragraphs 14 and 15 of this indictment.

8. Wherever the word "Chicago area" are used in this indictment, they are meant to signify and include the territory lying within the corporate limits of the cities of Chicago and Evanston, and the territory lying within the corporate limits of the villages of Wilmette, Kenilworth, Winnetka, Glencoe, and Oak Park, all in the State of Illinois.

III. Interstate Commerce.

9. The Chicago area has a population in excess of 3,500,000 persons and is one of the largest milk markets in the United States. Approximately one-half billion quarts of fluid milk are distributed and sold annually in the Chicago area. The total annual value of sales of fluid milk in the Chicago area and its vicinity by defendant corporations during 1946 was about $80,000,000, of which about $55,000,000 represented sales to their wholesale customers. The great majority of such sales were made in the Chicago area.

10. The corporate defendants sell and distribute approximately 65 per cent of the fluid milk consumed in the Chicago area.

7 11. About 60 per cent of the fluid milk sold in the Chicago area is produced in the States of Wisconsin and Indiana. Most of the remainder is produced in Illinois. Six of the corporate defendants purchase milk from producers (operators of dairy farms) located in either Wisconsin or Indiana, or both, and ship said milk by over-the-road motor vehicles or railroads into the Chicago area for sale. Each of the other corporate defendants buys and sells milk which is produced in States other than Illinois and which has been shipped by others from said States

into the Chicago area for sale. Milk produced in Wisconsin and Indiana becomes intermingled, prior to its sale by a defendant corporation, with milk produced in Illinois.

12. Fluid milk is by its nature perishable. It cannot be stored and must reach the consumer within a short time after production. All sales to consumers within the City of Chicago must, by City Ordinance, be made within 84 hours after the milk is delivered by a producer to a receiving station. Receiving stations are located in the States of Wisconsin, Indiana, and Illinois. From day to day there is a continuous flow of fluid milk and cream from producers in States other than Illinois, through the plants of defendants, to their wholesale customers in the Chicago area and its vicinity.

13. The purchase and receipt of said fluid milk in States other than Illinois, its transportation into the State of Illinois, and its processing, sale, and distribution in the Chicago area has constituted, and does constitute, interstate trade and commerce in fluid milk and cream between States other than Illinois and the State of Illinois.

IV. The Conspiracy.

14. During a period of approximately seven years immediately preceding the return of this indictment, the defendants, and others unknown to this jury, have knowingly and continuously engaged in an unlawful con-
8 spiracy to allocate among themselves the wholesale fluid milk customers in the Chicago area and sales of fluid milk to the Municipal Tuberculosis Sanitarium, Chicago, Illinois, to Cook County Jail, Chicago, Illinois, to Cook County Juvenile Detention Home, Chicago, Illinois, to Cook County Hospital, Chicago, Illinois, to Cook County Oak Forest Infirmary, Blue Island, Illinois, to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital, Hines, Illinois, to the United States Navy for delivery at the Naval Hospital, Great Lakes, Illinois, for delivery at the Naval Training Station, Great Lakes, Illinois, for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois, and to the United States Army for delivery at Fort Sheridan, Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois; which conspiracy has been in restraint of the hereinbefore

described trade and commerce in fluid milk, in violation of Section 1 of the Act of Congress of July 2, 1890 (U. S. C. Title 15, § 1), commonly known as the Sherman Act.

15. The aforesaid conspiracy has consisted of a continuing agreement and concert of action among the defendants, the substantial terms of which have been:

(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer
9 was dissatisfied with his supplier of fluid milk;

(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales.

16. For the purpose of forming and effectuating the aforesaid conspiracy, the defendants, by agreement and concerted action, have done the things which, as hereinabove alleged, they conspired to do.

V. Effects of the Conspiracy.

17. The conspiracy, as alleged in this indictment, has had the effect, as intended by the defendants, of allocating among defendants the business of selling fluid milk to the said named wholesale customers and to other wholesale customers in the Chicago area, thereby enabling them to obtain higher prices for their wholesale sales of fluid milk than they otherwise would have been able to secure.

VI. Jurisdiction and Venue.

18. The conspiracy herein alleged has been entered into and carried out, in part, within the Northern District of Illinois, Eastern Division, within the City of Chicago, where each of the corporate defendants has offices and transacts business. During the period of said conspiracy, and within the applicable period of the statute of limitations, defendants performed, within the Northern

District of Illinois, Eastern Division, many of the acts and entered into many of the agreements hereinbefore alleged in paragraphs 14, 15, and 16 of this indictment.

Dated July 30, 1948.

A True Bill:
Jesse J. Qurollo,
Foreman.

Herbert A. Bergson,
Assistant Attorney General.

Geo. B. Haddock,
Special Assistant to the Attorney General.

Otto Kerner, Jr.,
United States Attorney.

Melville C. Williams,
Special Assistant to the Attorney General.

Paul V. Ford,
Harry H. Faris,
George E. Leonard,
Walter A. Bolinger,
Special Attorneys,
Suite 826, 208 South LaSalle Street,
Chicago 4, Illinois,
Central 6886.

12 And afterwards on, to wit, the 13th day of June, 1949, came the Defendants, American Processings and Sales Company, et al., by their Respective Attorneys, and filed in the Clerk's office of said Court their certain Respective Motions For A Subpoena In Accordance With Rule 17(c) Of The Federal Rules Of Criminal Procedure, in words and figures following, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-Cr.-360) * *

MOTION FOR A SUBPOENA IN ACCORDANCE WITH RULE 17 (c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now comes American Processing And Sales Company, Defendant, and requests this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendant or its attorneys, all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans,
or furnishing refrigerators, to a wholesale customer of
14 another corporate defendant in order to cause such
customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defend-

ants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

15 "(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery

16 at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant," and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements." In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied wtih his supplier of fluid milk," and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage," in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises," and the name and address of each such customer.

Herman A. Fischer,
Carlton L. Fischer,
Attorneys for American Processing and Sales Company.

Of Counsel:
Campbell, Clithero and Fischer.

Received a copy of this motion this 13th day of June, 1949.

Melville C. Williams.

17 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—48-Cr.-360) • •

MOTION OF DEFENDANTS BELOIT DAIRY COMPANY AND S. D. McGUIRE FOR A SUBPOENA IN ACCORDANCE WITH RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come defendants Beloit Dairy Company and S. D. McGuire, and request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash,
18 loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either

not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

19 "(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about

20 April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defend-

ants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the al-
21 leged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Leo F. Tierney,
Donald M. Graham,
Attorneys for Beloit Dairy Company and S. D. McGuire.

Of Counsel:
Mayer, Meyer, Austrian & Platt.

22 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-Cr.-360) * *

MOTION OF DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 17 (c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come the Defendants, The Borden Company, H. H. Inglehart, O. N. Koenig, and O. O. Smaha, and jointly and severally request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

23 A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

24 "(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes,

25 Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, re[illegible]rained "from offering inducements" "to a wholesale customer of another corporate defendant," and the name and address of each such customer.

D. Each instance when a "corporate defendant" "of-

fered to customers of competitors of corporate defendants" "such inducements." In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk," and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage," in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, 26 and the store fixtures had not been removed from the premises," and the name and address of each such customer.

The Borden Company,
H. H. Inglehart,
O. N. Koenig,
O. O. Smaha,
By Howard Neitzert,
Edwin Clark Davis,
Walter J. Cummings, Jr.
Joseph A. Greaves,
Their Attorneys.

Sidley, Austin, Burgess & Harper,
Of Counsel.

Received a copy of the aforesaid Motion this 13th day of June, A. D. 1949.

Otto Kerner, Jr.,
United States Attorney,
Per E. J. Ryan.
Melville C. Williams,
Special Assistant to the Attorney General.

27 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-Cr.-360) * *

MOTION OF THE DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come Defendants, Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck, and request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans,
28 or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either

not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook
29 County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

30 B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" " to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "of-

fered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Louis E. Hart,
L. Edward Hart, Jr.,
Leo F. Tierney,
Donald M. Graham,
Attorneys for Defendants, Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck.

Montgomery, Hart, Pritchard & Herriott,
Mayer, Meyer, Austrian & Platt,
Of Counsel.

31 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-Cr.-360) * *

MOTION OF THE DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come, Capitol Dairy Company and Hyman I. Freed, defendants, and jointly and severally request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection, by the defendants or their attorneys, of all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of
32 another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate
33 defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more that the lowest of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

34 C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered, and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant",

in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Isidore and Herbert B. Fried,
Attorneys for Capitol Dairy Company and Hyman I. Freed.

35 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

MOTION OF CERTAIN DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come, Hunding Dairy Company, Western United Dairy Company and William R. Boruszak, Defendants, and jointly and severally request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another

corporate defendant in order to cause such customer
36 thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

37 "(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States

Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all
38 or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Thomas B. Gilmore,
Attorney for said Defendants.

39 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—48-Cr.-360) • •

MOTION OF THE DEFENDANT, MEADOWMOOR DAIRIES, INC., FOR A SUBPOENA IN ACCORDANCE WITH RULE 17 (c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now comes Meadowmoor Dairies, Inc., one of the defendants herein, and requests this Court for an order directing the United States Attorney, at a time and place therein to be specified, to produce and permit the inspection of by the Defendant or its attorneys all books, papers, documents or objects obtained by the United States Attorney other than by seizure or process from the Defendant or others upon which the United States Attorney intends to rely in the prosecution of this cause or are material to the proof of the issues of this cause for the preparation of the defense of each of the several Defendants herein above named.

Meadowmoor Dairies, Inc.,
By Charles W. Schaub,
Its Attorney.

Received a copy of the within Motion this 13th day of June 1949.

Melville C. Williams.

40 And on the same day to wit, the 13th day of June, 1949, came the Defendants, American Processing And Sales Company, et al., by their Respective Attorneys, and filed in the Clerk's office of said Court their certain Respective Motion For Discovery And Inspection In Accordance With Rule 16 of the Federal Rules Of Criminal Procedure in words and figures following, to wit:

41 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-Cr.-360) * *

MOTION FOR DISCOVERY AND INSPECTION IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now comes, American Processing And Sales Company, Defendant, and requests this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendant or its attorneys, all books, papers, documents or objects obtained by the United States of America from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause

42 such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer,

would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook
43 County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois. and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

44 B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Herman A. Fischer,
Carlton L. Fischer,
Attorneys for American Processing and Sales Company.

Of Counsel:
Campbell, Clithero and Fischer.

Received a copy of this motion this 13th day of June, 1949.

Melville C. Williams.

45 IN THE UNITED STATES DISTRICT COURT.
(Caption—48-Cr.-360)

MOTION OF DEFENDANTS BELOIT DAIRY COMPANY AND S. D. McGUIRE FOR DISCOVERY AND INSPECTION IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come defendants Beloit Dairy Company and S. D. McGuire, and request this Court for an order directing the United States of America, at a time and place and in a manner therein to be specified, to permit them to inspect and take copies or photographs of all books, papers, documents or tangible objects obtained by process or seizure from the defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

46 "(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either

not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

47 "(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April

48 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defend-

ants" "such inducements." In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the al-
49 leged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Leo F. Tierney,
Donald M. Graham,
Attorneys for Beloit Dairy Company and S. D. McGuire.

Of Counsel:
Mayer, Meyer, Austrian & Platt.

50 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-Cr.-360) * *

MOTION OF DEFENDANTS FOR DISCOVERY AND INSPECTION IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come the Defendants, The Borden Company, H. H. Inglehart, O. N. Koenig, and O. O. Smaha, and jointly and severally request this Court for an order directing the United States of America, at a time and place thereon to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

51 A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of the defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendant other than Beloit would either not bid at all or would bid more than Beloit on sales

of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales
52 of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of those two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United
53 States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant" in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another

corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the al-
54 leged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

The Borden Company,
H. H. Inglehart,
O. N. Koenig,
O. O. Smaha,
By Howard Neitzert,
Edwin Clark Davis,
Walter J. Cummings, Jr.,
Joseph A. Greaves,
Their Attorneys.

Sidley, Austin, Burgess & Harper,
Of Counsel.

Received a copy of the aforesaid Motion this 13th day of June, A. D. 1949.
Otto Kerner, Jr.,
United States Attorney,
Per E. J. Ryan,
Ass't U. S. Att'y,

Melville C. Williams,
Special Assistant to the Attorney General.

55 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—48-Cr.-360)

MOTION OF THE DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come Defendants, Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck, and request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such
56 customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either

not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other cor-
57 porate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

58 C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "of-

fered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Louis E. Hart
L. Edward Hart, Jr.
Leo F. Tierney
Donald M. Graham
Attorneys for Defendants,
Bowman Dairy Company,
Walter F. Kettell,
Francis H. Kullman, Jr., and
D. Cameron Peck.

Montgomery, Hart, Pritchard & Herriott
Mayer, Meyer, Austrian & Platt
Of Counsel.

59 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-Cr.-360) * *

MOTION OF DEFENDANTS FOR DISCOVERY AND INSPECTION IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come, Capitol Dairy Company and Hyman I. Freed, defendants, and jointly and severally request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection, by the defendants or their attorneys, of all books, papers, documents or objects obtained by the United States of America from or belonging to the defendants or obtained from the non-defendant milk distributors, and others by seizure or by process, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of
60 another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk.

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately
61 bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all
62 or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defend-

ants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy, of a customer whom such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Isidore and Herbert B. Fried,
Attorneys for Capitol Dairy Company and Hyman I. Freed.

63 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

MOTION OF CERTAIN DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come, Hunding Dairy Company, Western United Dairy Company and William R. Boruszak, Defendants, and jointly and severally request this Court for an order directing the United States of America at a time and place therein to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or

furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offer-
64 ing the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois.

65 "(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

66

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant," and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements." In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk," and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage," in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises," and the name and address of each such customer.

Thomas B. Gilmore,
Attorney for said Defendants.

67 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-Cr.-360) * *

MOTION OF DEFENDANT, MEADOWMOOR DAIRIES, INC., FOR DISCOVERY AND INSPECTION IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now comes Meadowmoor Dairies, Inc., one of the defendants herein, and requests this Court for an order directing the United States of America, at a time and place and in a manner therein to be specified, to permit the Defendant to inspect and take copies or photographs of all books, papers, documents, or tangible objects obtained by process or seizure belonging to the Defendant or others, dated and compiled during the period covered by the indictment, which demonstrate:

A. "(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose:

(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

68 (c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sale of fluid milk to Cook County Jail, Chicago, Illinois;

(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

(h) That defendants other than Capital would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Forest Infirmary, Blue Island, Illinois;

69 (i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Or acts in furtherance of the alleged terms of the conspiracy.

Meadowmoor Dairies, Inc.,
By Charles W. Schaub,
Its Attorney.

Received a copy of the within Motion this 13th day of June 1949.

Melville C. Williams.

70 And afterwards, to wit, on the 24th day of October, 1949, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

71 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

This cause coming on for hearing on the defendants' motions for bill of particulars, discovery, subpoena and to strike surplusage come the parties by their attorneys respectively and the Court having heard the arguments of counsel and being fully advised in the premises decides the defendants' motions for discovery under Rule 16 and for a subpoena under Rule 17c of the Federal Rules of Criminal Procedure, orally from the bench and it is

Ordered that counsel be and is hereby directed to prepare and present within a short date and upon notice a draft order consistent with the views expressed and it is

Further Ordered that the defendants' motions to strike surplusage and for bill of particulars be taken on briefs and arguments.

72 And afterwards on, to wit, the 1st day of November, 1949 there was filed in the Clerk's office of said Court a certain Subpoena Duces Tecum With Affidavit Of Service, Attached Thereto, in words and figures following, to wit:

73 SUBPOENA DUCES TECUM.

(Case No. 48 Cr. 360)

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

Northern District of Illinois.

The President of the United States of America.

To Otto Kerner, Jr., Esq., United States Attorney for the Northern District of Illinois, U. S. Court House, Chicago, Illinois, and Willis Hotchkiss, Esq., Special Assistant to the Attorney General, Suite 826, 208 S. LaSalle Street, Chicago, Illinois,—Greeting:

We Command You, that all business and excuses being laid aside, you and each of you attend before the Honorable John P. Barnes, one of the Judges of the District Court of the United States for said District, at a time and place to be specified in an order of said Court, in a certain cause now pending and undetermined in said Court, wherein United States of America is Plaintiff and Bowman Dairy Company, *et al.*, are Defendants, on the part of the defendants And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under

said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants, and paper writings what soever, that can or may afford any information or evidence in said cause. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshal of the Northern District of Illinois to execute and return in due form of law.

Witness, the Honorable John P. Barnes, Judge of the said Court, at Chicago, in said District, this 1st day of November, in the year of our Lord one thousand nine hundred and 49, and of the Independence of the United States of America the 174th year.

Roy H. Johnson,
Clerk.

(Seal Copy)

Endorsed: District Court of the United States. * * (Caption—48-Cr.-360) * * Subpoena Duces Tecum.

Montgomery, Hart, Pritchard & Herriott,
120 S. LaSalle St., Chgo., Ill.,

Mayer, Meyer, Austrian & Platt,
231 S. LaSalle St., Chgo., Ill.,

Sidley, Austin, Burgess & Harper,
11 S. LaSalle St., Chgo., Ill.,

Campbell, Clithero & Fischer,
1 N. LaSalle St., Chgo., Ill.,

Isidore and Herbert B. Fried,
111 W. Monroe St., Chgo., Ill.,

Packard, Barnes, Schumacher, Gilmore & Van Ness,
38 S. Dearborn, Chgo., Ill.,

Charles W. Schaub,
120 S. LaSalle St., Chgo., Ill.,
Attorneys for Defendants.

74 UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

AFFIDAVIT OF SERVICE OF SUBPOENA.

State of Illinois, } ss.
County of Cook. }

Charles F. Simon, being duly sworn, deposes and says: I am over the age of twenty-one years and reside at 2209 Ridge Avenue, Evanston, Illinois. On the 1st day of November, 1949, at 208 South La Salle Street, Chicago, Illinois, I served the annexed subpoena duces tecum on Willis L. Hotchkiss, United States Attorney, by exhibiting to him the original subpoena and delivering to and leaving personally with him a true copy thereof, and at the same time tendered to him the sum of Four Dollars and Fourteen Cents ($4.14), the fee required by law for attendance at Court as witness in the above entitled proceeding. The aforementioned witness fee was refused by the said Willis L. Hotchkiss. At the time of such service I knew the said Willis L. Hotchkiss to be the individual mentioned and described in said subpoena duces tecum.

Charles F. Simon.

Subscribed and sworn to before me this 1st day of November, 1949.

Kathryn M. Reilly,
(Seal) *Notary Public.*

My Commission Expires March 23, 1953.

75 And afterwards, to wit, on the 2nd day of November, 1949, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

76 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

On stipulation of the parties herein it is Ordered that the defendants' motions to settle orders in connection with defendants' motions under Rule 16 and Rule 17 C of the Federal Rules of Criminal Procedure be and the same are hereby set for hearing on November 7, 1949 at 10 o'clock A. M.

77 And afterwards on, to wit, the 7th day of December, 1949 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On November 7, 1949, Before Honorable John P. Barnes, Judge in words and figures following, to wit:

78 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360-1-2) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, on Monday, November 7, 1949, at 10:00 o'clock a. m.

Present:

79 Willard Hotchkiss, Esq., Special Assistant to the Attorney General, and other counsel, appearing on behalf of the Government;

L. Edward Hart, Jr., Esq., Leo F. Tierney, Esq., Donald M. Braham, Esq., and other counsel, appearing on behalf of defendants Bowman Dairy Company, et al.;

Howard Neitzert, Esq., Walter J. Cummings, Jr., Esq., and other counsel, appearing on behalf of defendants The Borden Company, et al.

And thereupon the following proceedings were had herein:—

By the Clerk: No. 48 Cr. 360. United States of America *vs.* Bowman Dairy Company, et al.

No. 48 Cr. 361. United States of America *vs.* Bowman Dairy Company, et al., and

No. 48 Cr. 362. United States of America *vs.* The Borden Company, et al.

By the Court: How much time do you think these cases will take?

By Mr. Hotchkiss: I would say they would either take two minutes, or they would take perhaps an hour, depending upon the desires of the Court.

By Mr. Cummings: Our part will only take a few minutes.

80 By the Court: Very well. I will hear you as soon as I dispose of my motions.

(And thereupon the Court gave attention to other matters upon the call, after which the following further proceedings were had herein:—)

By the Clerk: No. 48 Cr. 360. United States of America *vs.* Bowman Dairy Company, et al.

No. 48 Cr. 361. United States of America *vs.* Bowman Dairy Company, et al., and

No. 48 Cr. 362. United States of Amrecia *vs.* The Borden Company, et al.

By the Court: Proceed.

By Mr. Hart: If the Court please, we have settled the orders in all three cases, under our motions under Rule 16. The general form is that they show to us, or exhibit to us the documents listed in all the subpoenas duces tecum issued in connection with the milk investigation by the Grand Jury.

We have served a subpoena on the attorneys for the Government in 48 Cr. 360 under Rule 17(c).

We have endeavored to follow the rule in that subpoena, excepting from its demands certain documents of the type which your Honor stated you were unwilling to require
81 the Government to make available to us. Without presenting their objections to the exceptions as we have worded it in the subpoena, the Government has taken the position that they are not subject to Rule 17(c).

By the Court: Let's see Rule 17. (Booklet handed to the Court.)

Why not? I don't think the Government is something that is separate and apart. That doesn't appeal to me. And I haven't much patience with it. After all, when the Government comes into this court or any other court it is just a party litigant, just like any other party litigant.

In my opinion generally speaking I can't see any reason why that should not apply to the Government; and I don't care what anybody says about it except some court that can tell me what it means. If the Circuit Court of Appeals or the Supreme Court of the United States holds differently, why then I will have to follow that, and not until they do—the Government is just like any other litigant.

By Mr. Ho hkiss: Your Honor, in this proceeding counsel for the defense, as I pointed out to the Court before, in connection with the negotiations on the settlement of the

orders for the production of documents—and the Gov-
82 ernment leaned over backwards with respect to permitting, with respect to agreeing to the form of an order under Rule 16 which as the Court knows applies to these documents which the Government secured under process or seizure. Now, as to that order the Government agreed to a form of order which permitted the defendants here to secure access to every single document which was produced under grand jury subpoena.

Now, number two—

By the Court: The Government in that connection is just like the court under a similar situation. You are not to be commended for doing your duty.

By Mr. Hotchkiss: Now, on the question of the documents which were not secured by the Government in response to process or in response to subpoena, but which the Government secured voluntarily from volunteers or confidential informants or others not under subpoena, the Government offered as to those documents to enter into a stipulation with the defendants, giving them full access to those documents, reserving of course the privileged documents from those which would be turned over to the defendants.

Now, this is the position of the Government—and I ask the Court to bear with me for just a few minutes.

83 It is the position of the Government that the legislative history of Rule 17—

By the Court: Well, now, I have had occasion to talk about legislative history before. But there is nothing uncertain about (c), is there? Look at it?

By Mr. Hotchkiss: Yes, sir, I contend that there is nothing uncertain about (c) because the phraseology of the rule—Rule 17(c) does not apply to the Government or to the Government's attorneys, and was never intended to apply.

By the Court: Where do you see that language?

By Mr. Hotchkiss: Because in every instance in the criminal rules in which it was intended that the rules apply to the Government or to an attorney for the Government, the rules specifically spell it out that the rule does apply to the Government or to an attorney for the Government.

Now, this Rule 17(c) does not spell it out.

By the Court: Now, you have just strong-armed that, because I think 17(c) does apply to the Government.

By Mr. Hotchkiss: All right. Take 17(c) again, and look at the last sentence in 17(c).

By the Court: Listen! I will be glad to have you
84 take that question up. And if you want to spend the next two or three years following up that question instead of trying these defendants it is all right with me.

Now, you are going to give them that material or I will issue a subpoena to that effect. And you can just disobey it, and spend the next two or three years fighting that question out. It is a very interesting question—take a good deal of time, take a good many young men to investigate it, take probably two or three years to decide it.

By Mr. Hotchkiss: Your Honor, I believe—

By the Court: Now we will do that.

By Mr. Hotchkiss: Very well.

By the Court: And I think it applies to the United States. And I don't like this idea that the Government stands aside and is above any other kind of a litigant. I don't think that is the way we ought to act in a republic.

By Mr. Hotchkiss: Of course, I wish to point out—

By the Court: I am against you.

By Mr. Hotchkiss: Very well.

By the Court: I don't see any reason for exempting the Government. I am not going to do it. I am very glad to have it tested out.

85 By Mr. Hotchkiss: Very well.

The Government has offered voluntarily to let the documents be made available, but if the Court feels that subpoenas should issue—

By the Court: I am not insisting, but if you want to decide that very nice question of law, it is up to you to just spend the next two or three years getting it decided.

By Mr. Hotchkiss: Your Honor, I would respectfully suggest that the Court hear what the Government has to say.

By the Court: Now you are going to talk to me about that Senator so and so said this, and so on.

By Mr. Hotchkiss: I merely want to refer to what is in there.

By the Court: You point out to me in (c) any exception as to the Government. It is not there.

By Mr. Hotchkiss: I have said on the basis of the rules that they spell out the exception.

By the Court: I am against you.

By Mr. Hotchkiss: May I point out the last sentence of (c)?

By the Court: I am against you because, first, no rule or statute should be so written so as to treat the Government in that way. Second, it has not been so written.

86 If you want a decision, you just stand on it and I will issue a subpoena, and you can disobey it. There is a very nice question. I don't know how many young men you could put on that for the next year. The Supreme Court will have to decide it. That is what I will do.

By Mr. Hotchkiss: In other words, the Court does not wish to hear further argument from me?

By the Court: No I don't.

By Mr. Hotchkiss: Very well.

By the Court: I don't like that attitude on the part of the Government that they stand on a different basis than any other litigant. I don't like it. It is wrong.

By Mr. Hotchkiss: The Government simply takes the position that if the Congress had intended the terms of this rule to apply to the Government and to the Government attorneys it wouldn't have done what it did.

By the Court: I am against you.

By Mr. Hotchkiss: Because of the language in similar situations, an almost identical situation.

By the Court: The question is decided. I will be very glad indeed to have you take it up.

87 By Mr. Hotchkiss: Very well.

By Mr. Hart: If the Court please, a subpoena has been served and is attached to the order we have submitted under Rule 17(c). It contains in a parenthetical clause in the second, third and fourth lines the exceptions as closely as we could draft it to the documents your Honor said we could not see. I think we have covered everything your Honor mentioned in his discussion.

And other than that the subpoena calls for the production of documents that are volunteered, except as it is worded, Memoranda prepared by Government counsel and documents or papers solicited by or volunteered to Government counsel, which consist of narrative statements of persons or memoranda of interviews.

88 By the Court: All right. Do you know what you want to do now?

By Mr. Hotchkiss: Yes.

By the Court: What do you want to do?

By Mr. Hotchkiss: Your Honor, the Government isn't

going to quibble at this time with respect to the papers in this subpoena. In other words—

By the Court: I understood you to say that you were willing to give them all of that material, and you didn't need a subpoena issued. Is that it?

By Mr. Hotchkiss: The Government had offered to the defendants in writing to give them the material without the issuance of a subpoena.

By the Court: Well, what is the stipulation?

I am not anxious to hold anybody, if they will give you everything you want. But if counsel for the Government wants to have a decision by a court other than this on the question of whether a subpoena will lie in this case I will give them an opportunity to do that. I don't insist.

By Mr. Hotchkiss: Here is what I wrote to the defendants:

"In furtherance of the understanding we reached in court on the subject of the non-process documents"—

89 Not coming under Rule 16,

"the Government is ready to enter into a stipulation with the defendants in the 360 case"

The Sherman Act case,

"that it will make available for inspection etc. by the defendants all documents of evidentiary character (excepting privileged documents)."

Those are the documents that the Court ruled that the Government doesn't have to turn over to the defendants, work product of the Government or similar material,

"which the Government now holds and which it obtained in connection with the investigation relating to these cases and which the Government obtained without any service of process."

Now, I think that is the broadest possible kind of a stipulation. In other words, if the defendants want to see the documents, very well, the Government is willing to let them see them under this stipulation.

By the Court: What order do you want? What is wrong with that?

By Mr. Hart: The qualification to that is that the
90 documents be evidentiary in character, and it is going to be up to the Government attorneys to determine.

By Mr. Hotchkiss: But, your Honor—

By the Court: If they offer papers which they have had in their possession and they haven't been made available to you they won't go in.

By Mr. Hart: I appreciate that. But not only do we want to get a look at those documents, but other documents which me might feel might be evidentiary in character to use at the trial.

By Mr. Hotchkiss: Oh, the Government intends to give the defendants everything that will be favorable to them as well as anything that may be favorable to the Government. By the use of the term "evidentiary" the Government was simply in this letter attempting to express what the Government felt was this court's intention as expressed in the hearings which we had.

By the Court: I don't know how you can go beyond this in a writ.

By Mr. Hotchkiss: Even this proposal here doesn't go beyond that, because obviously he cannot call for anything which is not evidentiary, or which could not be used somehow or other as evidence.

91 By the Court: What I mean is if you get that by stipulation I don't see how you could go beyond it in a writ. And I think apparently the Government is offering by stipulation all that I can give you by writ.

By Mr. Hart: I think they are coming close to it, if the Court please.

By the Court: What else?

By Mr. Hart: But I don't think they are going quite far enough.

By the Court: How would you modify it?

By Mr. Hart: I think the exception that we have inserted in that subpoena.

By the Court: What is that?

By Mr. Hart: Which excepts certain types of documents.

By Mr. Hotchkiss: As I say, your Honor, as far as the stipulation is concerned, while we might have some question as to purely matters of form—

By the Court: Look at it and see if there is any difference.

By Mr. Hart: You have a copy of it.

By Mr. Hotchkiss: Now your Honor I think there is just one rather minor point.

By the Court: What page is it on?

92 By Mr. Hart: It is attached as an exhibit at the back of that order, if the Court please. Those are the orders under 16; the 17(c) is the last order you have.

By the Court: What is it?

By Mr. Hotchkiss: There is only one objection—basic objection which I would make to the form which is proposed: This language in this subpoena or proposed subpoena, as I construe it does not protect those confidential informants who have provided the Government with confidential material which the Government feels on the basis of very well established principles followed by the courts are normally protected from the view of litigants.

By the Court: Where would you put it in?

By Mr. Hotchkiss: I would put it after the "except" in the parenthetical material, "except memoranda prepared by Government counsel".

By the Court: Wait a minute.

By Mr. Hotchkiss: That is obviously—

By the Court: I want that. Where is that paper now?

By Mr. Hotchkiss: It is in this subpoena.

By Mr. Hart: It is in the parenthetical clause, if the Court please.

93 By the Court: Except what?

By Mr. Hotchkiss: It speaks of documents, and so on (except memoranda prepared by Government counsel); that is work product of the Government.

"and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews."

Now, I don't think that that "except" material set forth in the parenthetical clause of the subpoena protects the situation.

By the Court: What would you add to it?

By Mr. Hotchkiss: "and documents furnished the Government without process or seizure by voluntary informants."

For example, let me give just an illustration of the type of situation I feel that the Court should be cognizant of. Taking purely a hypothetical situation, suppose an employe of one of these defendant companies should have come to the Government and have said, "Now I have in my possession certain documents bearing on the charges which the Government has made. I understand that you haven't secured these documents under the subpoenas, and I would like to turn them over to you so as to further the in-

94 terests of justice and to provide the Government with necessary evidentiary material regarding the charges made in the indictments."

And the Government says, "Yes, thank you, sir, we are glad to have these."

And the informant says, "Now, I want to keep out of this, you understand, because if it became known that I turned this documentary material over to you, you know what would happen to me, I would lose my job."

And the Government says, "Well, yes, we will do everything we can to protect you so that you won't lose your job, and the fact that you did give this information as a confidential informant will not come to the attention of the defendants."

I use that purely hypothetical illustration to show the type of protection that I think public policy demands be afforded to the documentary material which has been supplied to the Government by confidential informants.

By Mr. Hart: The difficulty there is, if the Court please, that Mr. Hotchkiss wants not only to keep from us the name of the informant—which we don't want, but the documents which he has brought in, which he says are evi-
95 dentiary. And that is the general tone of the letter and the discussion the Government has had with us. So that we feel that under 17(c) that we are entitled to that type of material that is volunteered.

If he writes a letter or something in which he transmits the documents, that is a factual situation, and that we have agreed to except, and we don't want it. But if he brings in certain lists or whatever they may happen to consist of and volunteers them to the Government, we want them, and we feel that we are entitled to them.

By Mr. Neitzert: Government counsel's illustration would be more appropriate I think if he had said that a large volume of the documents were obtained from a competitor of these defendants. And what we want is to see those documents that the Government obtained not under process, but voluntarily furnished by these informants, who are not, your Honor, people who are going to lose their jobs!

By Mr. Hotchkiss: As to these documents referred to, the overwhelming bulk of these documents in so far as I know, all of them were secured in response to subpoenas duces tecum issued by the Grand Jury. And those documents are available to the defendants under the pro-
96 posed order which will be submitted to the court with respect to Rule 16.

However, I should point this out—or, let us assume a

hypothetical situation; and let us assume further it may be an actual situation, that some competitor of these defendants came to the Government and said, "Look, I have some confidential material that will help you in your case, but I don't want to get mixed up in this, I don't want to have it mentioned that I am providing you with information, because I am afraid of my economic existence if such fact becomes known."

Now, I submit, your Honor, that public policy demands that that competitor be afforded the protection of this court in the interests of justice.

By Mr. Neitzert: Are you referring possibly to unlawful reprisals?

By Mr. Hotchkiss: I am referring to any kind of reprisal that may be instituted.

By Mr. Neitzert: I don't think it is any of the Government's job to protect competitors of these defendants.

By Mr. Tierney: If I may make a remark here, I feel that we are entitled to look at these documents as a matter of right under 17(c), and that neither this court or
97 these defendants should be permitted only to look at them because the Government after they have resisted this motion of ours now say, "In order to avoid the ruling by this court we will show you these but we want the court to enter an order to protect this and to protect that before looking at these documents."

I think that 17(c) gives your Honor power to enter the order. And so far as my office is concerned we don't care for a stipulated order. I would like to see an order of the court and as explicit as possible.

By Mr. Hart: The question as to whether that applied to the Government came up in the case of the United States *vs.* Bondi, Second Circuit Court of Appeals. And in that case the court ruled that 17(c) did apply to the Government. So that this is not an initial ruling on the subject at all.

Now, if there is difficulty as to the exception and if it should be changed we will be very glad to change it in accordance with your Honor's ideas on the subject.

We think that it covers everything of the type that Mr. Hotchkiss has been talking about except about his "evi-
dentiary material" which is "brought in voluntarily".
98 Now that we contend under that rule we should be able to view.

By the Court: I have studied this statement here in this proposed subpoena and I don't see much wrong with it.

By Mr. Hotchkiss: Well, I agree with that except for this possibility that the subpoena might pull in those documents which it seems to me are privileged and which it seems to me that the Court in its colloquy of October 24th regarded also as being privileged.

I don't have any particular objection to this particular form if it is in the stipulated order.

I might say further, your Honor, that in a sense we are discussing a moot situation, because I don't believe—

By Mr. Cummings: It has been decided in the Second Circuit.

By Mr. Hart: That is the United States *vs.* Bondi case, your Honor.

By the Court: Such memoranda as prepared by Government counsel, documents or papers.

By Mr. Hart: Solicited by or volunteered.

By Mr. Hotchkiss: Or memoranda of interviews.

By the Court: Or memoranda of interviews.

99 By Mr. Hotchkiss: Suppose that in addition to the Government having received a narrative statement from some person regarding certain aspects of the indictments in these cases and this informant had provided a narrative statement, and clipped to that narrative statement was some documentary material which he volunteered. And in his narrative statement he says, "This is given to you in confidence". What have you got?

By the Court: I know, but there isn't any such thing, there isn't any such thing.

By Mr. Hotchkiss: You mean there isn't any such thing here?

By the Court: Yes, confidence from a court to find out what the facts are.

By Mr. Hotchkiss: I appreciate that the court may order such documents produced. But I submit that historically the courts have always as a matter of public policy protected informants and protected the information secured from informants.

Normally the bulk of the Government's material—evidentiary material is secured through grand jury process on grand jury subpoenas that were issued.

Here in this case dozens of grand jury subpoenas
100 were issued directed to scores of firms, and an enormous amount of documentary material has been se-

cured. The Government has interposed no objection to letting them have all of that.

By the Court: Well, we have had quite a broad experience with the new civil rules, and they have been a great step forward in the handling of litigation, and they have brought progress. And we have used them to require the litigants to show their facts on the table to speed up and bring an end to litigation. There isn't any doubt about it. And I don't see why it can't be applied to criminal cases, that instead of taking six months to try a case it really ought to be tried in two or three weeks if we can do it.

I know how offensive an idea it is to a lawyer to make him show his case, that it is much like plunging a dagger into his heart. But the judge takes a somewhat different view of it to the end of getting through with the litigation and doing justice between the parties. And he is not particularly tender about John Jones being offended because somebody finds out that he is a tale bearer. Men have been tale bearers since the beginning of the world, and they will continue to be. And they are usually found out any-

101 how.

I don't see anything wrong with this statement. I will be glad to have you agree on it. On the other hand, I will be very glad to have you go up if the Government wants to go up.

By Mr. Hotchkiss: I might point out that the Government all the way through this proceeding has indicated that as far as Rule 16 is concerned we are very happy to let them have this material.

By the Court: I know that. But I won't give you any credit for that. I am not going to give you any credit for doing your duty.

By Mr. Hotchkiss: On this form the Government did not and never has been in this proceeding challenging it.

By the Court: No, all I want to know, do you want to give them these papers as enumerated in this part of the subpoena or do you want me to make that order? Now, which is it?

By Mr. Hotchkiss: Your Honor, as far as the documents in the possession of the Government at the present time, the Government stands willing now as it has stood willing prior to this time to enter into a stipulation with the defendants embodying those terms, if you please.

102 By the Court: Very well.

By Mr. Hotchkiss: Except the defendants have in-

sisted, I understand, that they want a subpoena. Now, if they want a subpoena and insist upon a subpoena embodying these terms, very well.

By the Court: What do you want?

By Mr. Hart: We have already served a subpoena, that is true, if the Court please, which in the orderly course of business we have to do.

The order merely directs how that subpoena shall be complied with and at what time and place.

By Mr. Cummings: The same proceeding followed by Judge Bondi in that case.

By Mr. Hart: The subpoena there was served and then an order submitted to the court which he signed later on directing the method of compliance.

By Mr. Hotchkiss: I might point out that this is not a matter that—I haven't called it to counsel's attention, but Judge Niven within the last two weeks in the Southern District of Ohio has refused to issue a subpoena under Rule 17.

By Mr. Hart: That is not entirely true, if the Court please. He refused to issue a subpoena under a motion

By the Court: Really, you know we District Judges 103 are not infallible, and we all make mistakes. And I make my share, and most of the other Judges make their share.

I think the parties are entitled to this material. I don't care what anybody else thinks except the Circuit Court of Appeals of the Seventh Circuit or the Supreme Court of the United States.

Now, what date in November? Would anybody make a suggestion?

By Mr. Hart: That is entirely at the convenience of the Government. We will start any time they are ready.

By the Court: Do you want to participate in this matter to the extent of making suggestions as to the date in November that is agreeable?

By Mr. Hotchkiss: Oh, say November 15th. And we will advise defense counsel if we cannot meet that date.

By Mr. Hart: That is all right. No difficulty about that.

By Mr. Hotchkiss: That is purely a formal matter.

By Mr. Hart: If the Court please, I suggest that the same date be entered in the other three orders, which are agreeable to the Government. And we will be glad to cooperate with them in making any extension of that if they find it is inconvenient.

105 And to wit, on the 7th day of November, 1949, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following two entries, to wit:

106 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

ORDER.

This cause coming on to be heard on defendants' motions to require the attorneys for the Government to permit defendants to inspect and copy or photograph certain books, papers, documents and objects under Rule 16 of the Federal Rules of Criminal Procedure and the Court being fully advised,

It Is Ordered that the attorneys for the Government are directed to permit defendants or their attorneys or agents to inspect and copy or photograph (at the office of the Department of Justice, Antitrust Division, located at 208 South La Salle Street, Chicago, Illinois), all books, papers, documents or tangible objects which are now in the custody of the Government and which were received by it in response to the several grand jury subpoenas duces tecum listed on Exhibit A hereto attached, which is by reference made a part hereof. Such inspection, copying, and photographing shall be permitted to begin on November 15th, 1949, and continue from time to time thereafter during usual office hours until such inspection and copying, or

107 photographing shall with reasonable dispatch be completed. Government attorneys shall make available reasonable accommodations for such inspection and copying or photographing, and

It Is Further Ordered that except as hereinabove provided, the defendants' motions for discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure be and the same are hereby denied.

John P. Barnes,
United States District Judge.

Dated: November 7th, 1949.

108 EXHIBIT A.

Subpoena Duces Tecum

		Date Issued	Returnable
1.	Belmont Dairy Company 221 North La Salle Street Chicago 1, Illinois	9/17/47	10/3/47
2.	Hawthorne-Mellody Farms Dairy, Inc. 4224 West Chicago Avenue Chicago 51, Illinois	9/17/47	10/3/47
3.	Hawthorne-Mellody Farms Dairy, Inc. 4224 West Chicago Avenue Chicago 51, Illinois	7/9/48	7/22/48
4.	Hawthorne-Mellody Farms Dairy, Inc. 4224 West Chicago Avenue Chicago 51, Illinois	5/6/48	5/19/48
5.	C. J. Wieland & Son, Inc. 4942 West Lawrence Avenue Chicago 30, Illinois	9/17/47	10/3/47
6.	American Processing & Sales Company 4224 West Chicago Avenue Chicago 51, Illinois	5/6/48	5/19/48
7.	Ridgeview Farm Dairy, Inc. 923 North Wolcott Avenue Chicago 22, Illinois	5/6/48	5/19/48
8.	National Tea Company 1000 Crosby Street Chicago, Illinos	7/9/48	7/22/48
9.	The Congress Hotel (Alfred L. Nielsen) 520 South Michigan Boulevard Chicago, Illinois	7/19/48	7/26/48
10.	Ogden Dairy Company 4333 Ogden Avenue Chicago, Illinois	5/6/48	5/19/48
11.	Belmont Dairy Company 1636 North Honore Chicago, Illinois	5/6/48	5/19/48

		Date Issued	Returnable
12.	Lake Valley Farm Products, Inc. 5330 South Western Avenue Chicago 9, Illinois	5/6/48	5/19/48
13.	Lake Zurich Milk Company 210 West Chestnut Street Chicago 10, Illinois	5/6/48	5/19/48
109 14.	Lakeview Dairy Company 5332 South Western Avenue Chicago 9, Illinois	5/6/48	5/19/48
15.	Western United Dairy Company 1441 West Edgemont Avenue Chicago, Illinois	5/6/48	5/19/48
16.	International Dairy Company 1910 South Ashland Avenue Chicago, Illinois	5/6/48	5/19/48
17.	Capitol Dairy Company 4326 South Wabash Avenue Chicago, Illinois	5/6/48	5/19/48
18.	Hunding Dairy Company 1300 East 71st Street Chicago, Illinois	5/6/48	5/19/48
19.	Meadowmoor Dairies, Inc. 1334 South Peoria Street Chicago, Illinois	5/6/48	5/17/48
20.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	1/16/48	2/16/48
21.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	12/2/47	12/5/47
22.	The Borden Company 3638 North Broadway Chicago, Illinois	12/9/47	12/12/47
23.	Peat Marwick Mitchell & Company 105 South La Salle Street Chicago, Illinois	11/24/47	11/26/47
24.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	9/17/47	10/2/47
25.	Beloit Dairy Company 210 West Chestnut Street Chicago, Illinois	9/17/47	10/3/47

		Date Issued	Returnable
26.	Capitol Dairy Company 4326 South Wabash Avenue Chicago, Illinois	9/17/47	10/2/47
27.	Hunding Dairy Company 1300 East 71st Street Chicago, Illinois	9/17/47	10/2/47
110 28.	International Dairy Company 1912 South Ashland Avenue Chicago, Illinois	9/17/47	10/2/47
29.	Meadowmoor Dairies, Inc. 1334 South Peoria Chicago, Illinois	9/17/47	10/3/47
30.	Ogden Dairy Company 4333 Ogden Avenue Chicago 23, Illinois	9/17/47	10/3/47
31.	Ridgeview Farms Dairy, Inc. 923 North Wolcott Avenue Chicago 22, Illinois	9/17/47	10/3/47
32.	Western United Dairy Company 1441 West Edgemont Avenue Chicago 7, Illinois	9/17/47	10/2/47
33.	The Borden Company 3638 North Broadway Chicago, Illinois	9/17/47	10/2/47
34.	Dean Milk Company 20 North Wacker Drive Chicago 6, Illinois	9/17/47	10/3/47
35.	Sidney Wanzer & Sons, Inc. 123 West Garfield Boulevard Chicago 9, Illinois	9/17/47	10/2/47
36.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	12/8/47	12/12/47
37.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	12/8/47	12/10/47
38.	The Borden Company 3638 North Broadway Chicago, Illinois	1/16/48	2/16/48
39.	National Tea Company 1000 Crosby Street Chicago, Illinois	2/4/48	2/16/48

		Date Issued	Returnable
40.	The Borden Company 3638 North Broadway Chicago, Illinois	1/19/48	2/16/48
41.	The Kroger Company 33 South Clark Street Chicago, Illinois	2/4/48	2/16/48
42.	High-Low Foods, Inc. 30 West 87th Street Chicago, Illinois	2/4/48	2/16/48
111 43.	The Great Atlantic & Pacific Tea Company 2622 North Pulaski Road Chicago, Illinois	2/4/48	2/16/48
44.	Jewel Tea Company Barrington, Illinois	2/4/48	2/16/48
45.	J. H. Greenhalgh & Company 1 North La Salle Street Chicago, Illinois	11/14/47	11/21/47
46.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	12/10/47	12/12/47
47.	Beloit Dairy Company 218 West Chestnut Street Chicago, Illinois	12/10/47	12/12/47
48.	R. P. Alexander, Comptroller Pure Milk Association 608 South Dearborn Street Chicago, Illinois	12/16/47	12/17/47
49.	Milk Wagon Drivers Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America 220 South Ashland Boulevard Chicago, Illinois	9/19/47	10/6/47
50.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	12/8/47	12/10/47
51.	Milk Vendors Association 111 West Monroe Street Chicago, Illinois	9/19/47	10/6/47

	Date Issued	Returnable
52. Dairy Employees Union, Local 754, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America 220 South Ashland Boulevard Chicago, Illinois	9/23/47	10/6/47
53. Chicago Milk Dealers Association 6607 South Greenwood Avenue Chicago, Illinois	9/19/47	10/6/47
54. Associated Milk Dealers, Inc. 309 West Jackson Chicago, Illinois	9/19/47	10/6/47
55. Progressive Milk Dealers Association 1 North La Salle Street Chicago, Illinois	9/19/47	10/6/47
56. Harris Trust & Savings Bank 115 West Monroe Street Chicago, Illinois	2/19/48	2/20/48

112 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

ORDER.

This matter coming on to be heard on the defendants' motions for a subpoena for production of documentary evidence pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, and the Court having heard and considered the arguments of counsel and having read and considered the briefs presented by counsel in support of their positions,

It Is Ordered that the books, papers, and documents designated in the subpoena directed to Otto Kerner, Jr., Esq., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Esq., Special Assistant to the Attorney General, a copy of which is attached hereto, be produced by the Government at the office of the De-

partment of Justice, Antitrust Division, located at 208 South La Salle Street, Chicago, Illinois, on November 15th, 1949, and that the defendants and their attorneys, proceeding with reasonable dispatch, be permitted to inspect and copy or photograph such books, papers and documents on the date specified above and succeeding days, and that the Government attorneys make available suitable accommodations for such inspection and copying or photographing, and

It Is Further Ordered that except as hereinabove provided the defendants' motions for a subpoena for production of documentary evidence, pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure be, and the same hereby are denied.

John P. Barnes,
United States District Judge.

Dated: November 7th, 1949.

SUBPOENA DUCES TECUM.

Case No. 48 CR 360.

DISTRICT COURT OF THE UNITED STATES OF AMERICA

Northern District of Illinois.

The President of the United States of America To Otto Kerner, Jr., Esq., United States Attorney for the Northern District of Illinois, U. S. Court House, Chicago, Illinois, and Willis Hotchkiss, Esq., Special Assistant to the Attorney General, Suite 826, 206 S. La Salle Street, Chicago, Illinois—Greeting:

We Command You, that all business and excuses being laid aside, you and each of you attend before the Honorable John P. Barnes, one of the Judges of the District Court of the United States for said District, at a time and place to be specified in an order of said Court, in a certain cause now pending and undetermined in said Court, wherein United States of America is Plaintiff and Bowman Dairy Company, et al., are Defendants, on the part of the defendants. And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce

at the time and place aforesaid, all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or paper solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshall of the Northern District of Illinois to execute and return in due form of law.

Witness, the Honorable John P. Barnes, Judge of the said Court, at Chicago, in said District, this 1st day of November, in the year of our Lord one thousand nine hundred and 49, and of the Independence of the United States of America the 174th year.

Roy H. Johnson,
Clerk.

(Seal Copy)

Endorsed: District Court of the United States. * * (Caption—48-Cr-360) * *. Subpoena Duces Tecum. Montgomery, Hart, Pritchard & Harriott, 120 S. La Salle St., Chgo., Ill. Mayer, Meyer, Austrian & Platt, 231 S. La Salle St., Chgo., Ill. Sidley, Austin, Burgess & Harper, 11 S. La Salle St., Chgo., Ill. Campbell, Clithero & Fischer, 1 N. La Salle St., Chgo., Ill. Isidore and Herbert B. Fried, 111 W. Monroe St., Chgo., Ill. Packard, Barnes, Schumacher, Gilmore & Van Ness, 38 S. Dearborn, Chgo., Ill. Charles W. Schaub, 120 S. La Salle St., Chgo., Ill., Attorneys for Defendants.

115 And afterwards, to wit, on the 14th day of November, 1949, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

116 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

ORDER.

Upon stipulation of the parties, it is ordered that the order dated November 7, 1949 directing Otto Kerner, Jr. and Willis L. Hotchkiss, Esq. to produce certain books, papers, and documents designated in a subpoena attached to said order, be amended by changing the return date from November 15, 1949 to November 28, 1949.

Enter:

John P. Barnes,
Judge.

Date: November 14, 1949.

117 And afterwards on, to wit, the 28th day of November, 1949, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion to Quash Subpoena in words and figures following, to wit:

118 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

MOTION TO QUASH SUBPOENA.

The United States of America, by its attorneys, moves to quash (a) the subpoena served November 1, 1949, pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, at the instance of the defendants herein, on Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, and (b) set aside the order entered by this Court on November 7, 1949, directing the said attorneys for the Government to produce for inspection and

copying by the defendants the books, papers, documents, and objects designated in the aforesaid subpoena.

The grounds for this motion to quash are that:

(a) A subpoena for the production of books, papers, documents or other objects may not, under Rule 17 (c) of the Federal Rules of Criminal Procedure, issue against an attorney for the Government;

(b) This Court acted outside the scope of its jurisdiction in ordering that Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, produce, for inspection and copying by the defendants and
119 their attorneys, the boooks, papers, documents and objects designated by a subpoena issued under Rule 17(c) of the Federal Rules of Criminal Procedure against such attorneys for the Government;

(c) The right of defendants in criminal proceedings to obtain access to books, papers, documents, or objects in the custody of attorneys for the Government, as such term is defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted to such defendants by Rule 16 of the Federal Rules of Criminal Procedure, and the application of such Rule 16 exhausts the rights of the defendants to secure access to such books, records, documents, or other objects in the custody of an attorney for the Government.

Willis L. Hotchkiss,
Special Assistant to the Attorney General.
Suite 820,
208 South La Salle Street,
Chicago 4, Illinois,
Central 6-6886.

120 And on the same day, to wit, on the 28th day of November, 1949, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

121 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

This cause this day coming on for hearing on the motion of the United States by the United States Attorney to quash the subpoena issued herein under Rule 17(c) of the Federal Rules of Criminal Procedure and to set aside the order entered herein on November 7, 1949 come the parties by their counsel and on agreement of the parties by counsel now made in open Court further arguments and further briefs are waived and said motion to quash and set aside the order entered on November 7, 1949 is hereby taken under advisement by the Court.

122 And afterwards on, to wit, the 27th day of December, 1949, there was filed in the Clerk's office of said Court a certain Memorandum of the Court in words and figures following, to wit:

123 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

MEMORANDUM.

This cause came on to be heard on the motions of the defendants (1) for bills of particulars; (2) to strike surplusage from the indictments; and (3) for subpoenas for production of documentary evidence pursuant to Rule 17(c). Briefs were filed by counsel for the respective parties and have been considered by the court, the oral arguments of counsel have been heard and considered by the court. The motions of the defendants for subpoenas for production of documentary evidence pursuant to Rule 17(c) have heretofore been granted, but counsel for the Government, on

November 28, 1949, moved to quash the subpoenas served November 1, 1949, pursuant to Rule 17(c) and to set aside the order rendered November 7, 1949. Upon the hearing of said motion to quash, both sides waived the filing of further briefs and the making of further arguments.

The foregoing motions and the briefs and arguments of the respective parties for and against the granting of said motions having been considered by the court, the court is of opinion:

124 1. That the motion for bills of particulars may be granted to the extent that they ask for the names of officers and agents through whom a firm or corporation became a party to the conspiracy and the time when it is contended each defendant joined the conspiracy. To the extent that they ask for other particulars they may be denied.

2. That the motions of defendants to strike surplusage from the indictment may be allowed; and

3. That the motion of the Government to quash the subpoena served November 1, 1945, pursuant to Rule 17(c) and to set aside the order entered on November 7, 1949, may be denied.

Appropriate orders may be made on January 4, 1950, at 10 o'clock A. M., without other notice than this.

John P. Barnes,
Judge.

December 27, 1949.

125 And afterwards on, to wit, the 10th day of January, 1950, there was filed in the Clerk's office of said Court a certain Transcript of Proceedings Had on January 4 and 5, 1950, Before the Honorable John P. Barnes, Judge, in words and figures following, to wit:

126 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360-1-2) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, on January 4, 1950, beginning at 10:00 o'clock a. m.

127 Present:

Willis L. Hotchkiss, Esq., Special Assistant to the Attorney General; Paul V. Ford, Esq., Harry H. Faris, Esq., George E. Leonard, Esq., Dorothy M. Hunt, Special Attorneys; Robert W. Brunn, Esq., appearing on behalf of the Government;

L. Edward Hart, Jr., Esq., Leo F. Tierney, Esq., Donald M. Braham, Esq., Messrs. Montgomery, Hart, Pritchard & Herriott, Messrs. Mayer, Meyer, Austrian & Platt, appearing on behalf of Bowman Dairy Company, J. A. Bowman, F. H. Kullman, Jr., E. J. Larson, M. M. Metzger, David B. Peck and D. Cameron Peck;

Walter J. Cummings, Jr., Esq., Joseph A. Greaves, Esq., Messrs. Sidley, Austin, Burgess & Harper, appearing on behalf of The Borden Company, H. H. Inglehart and O. N. Koenig.

And other counsel.

128 And thereupon the following proceedings were had herein:

By the Clerk: No. 48 CR 360, United States *vs.* Bowman Dairy Company, et al.

No. 48 CR 361, United States *vs.* Bowman Dairy Company, et al.; and

No. 48 CR 362, United States *vs.* The Borden Company.

By Mr. Hart: If the Court please, we have here the orders that were suggested by your memorandum in all the cases.

They are separate, each one covering one of the motions in the various separate cases, in accordance with the memorandum that your Honor filed on December 27th.

By the Court: These have been circulated, have they?

By Mr. Hart: We have not seen the Government's. They have just been handed me.

I assume that none of them are very complicated, in that they follow in Nos. 361 and 362 wherein the two motions were simply denied in toto, so that I cannot conceive that we will have any objections.

By the Court: How about the orders in No. 360, is there any question whether they comply with what the
129 Court directed to be done?

By Mr. Hotchkiss: No, sir.

By the Court: If there is not, I will sign them: Ordered that the plaintiff file such specifications within blank days from the date of this order. How many days?

By Mr. Hart: They ask thirty, and that is agreeable to us, if the Court please.

By the Court: Is there any contention that the draft of the orders in No. 361 does not comply with what the court directed to be done?

By Mr. Hart: I have only seen one of them. That has to do with surplusage. That apparently is in order. I do not have a copy of the other, but if it merely denies—

By the Court: I only see one.

By Mr. Hart: Oh, wait a minute. I guess that covers both.

I have one that is numbered 362; that apparently corresponds with your memorandum in that both the motions for bill of particulars and to strike surplusage were denied in toto.

By the Court: No. 361 is the same?

By Mr. Hart: I think both of them are the same, if the Court please.

130 Now, if the Court please, as the matter now stands, there was an order of the Court that we be allowed to inspect those documents, starting November 15th, which by further order was extended to November 28th.

At that time the Government filed a motion to quash that subpoena.

I think it might be in order now to set some date at which

point we could begin to examine the documents, if the Government is going to agree to it.

By the Court: When do you want to begin?

By Mr. Hart: Well, any date from now on, we are perfectly willing to begin.

By the Court: Has the Government any suggestions?

By Mr. Hotchkiss: Your Honor, the Government has a written statement to submit to the Court at this time. (Handing document to the Court.)

I call your attention to the last paragraph.

By Mr. Tierney: May we have a copy of it?

By Mr. Hotchkiss: Yes. (Handing document to counsel.)

I call attention to the last paragraph of the statement, this, my statement, in which I say, "For the foregoing reasons"—

131 By the Court: Well, let me read it all so that I know what is in it.

(After a brief interval.)

By the Court: I have read this statement.

Have counsel for the defendants read it?

By Mr. Hart: I have read it hastily, if the Court please.

By Mr. Hotchkiss: The defendants have been advised as to the action that the Government would take.

By the Court: If you gentlemen have any matters to submit to the Court, the Court is here. Otherwise I will transfer my attention to some other matter.

By Mr. Hart: Well, if the Court please, we have been advised as to the general nature of this statement to be made by Mr. Hotchkiss.

And we have prepared a motion—which we had to prepare prior to seeing this statement; I think, however, it covers the facts and perhaps is not at variance with the facts as stated in the statement, the motion being to adjudge the Attorney General, or the Assistant to the Attorney General, Mr. Willis L. Hotchkiss, in contempt.

By the Court: Let me see it.

(Document handed to the Court.)

By Mr. Hart: Under Rule 17(g) of the Federal
132 Rules of Criminal Procedure—

By the Court: You mean that you gentlemen did not see this communication which counsel handed to the Court a moment ago?

By Mr. Hart: No. We had a conference with Mr. Hotchkiss—

By the Court: Well, then, the thing for you to do is to consider until two o'clock.

By Mr. Hart: Very well.

By the Court: And then if you desire to make any motions, I will hear you.

(Whereupon the further hearing of the above entitled matters was continued until 2:00 o'clock p. m. of the same day, January 4, 1949.)

133 Chicago, Illinois,
January 4, 1950,
2:00 o'clock p. m.

Met pursuant to recess.

Present:

Mr. Hotchkiss,
Mr. Ford,
Mr. Faris,
Mr. Leonard,
Miss Hunt,
Mr. Brunn,
Mr. L. Edward Hart,
Mr. Tierney,
Mr. Braham,
Mr. Cummings,
Mr. Greaves,
And other counsel.

134 And thereupon the following further proceedings were had herein:

By the Clerk: No. 48 CR 360, United States *vs.* Bowman Dairy Company, et al.

(Mr. Hart handed a document to the Court.)

By Mr. Hart: If the Court please, we have made some slight changes in the motion that we first offered this morning, in order to make the allegations of some parts of the motion agree with the affidavit that Mr. Hotchkiss filed.

The motion is in the alternative, asking that the Court order the staying of further proceedings in this case, or adjudge Willis L. Hotchkiss in contempt of court until such time as he shall obey the subpoena duces tecum which issued —which it attached to the motion, marked "Exhibit A"; and the order of court entered on November 7—which is attached to the motion, marked "Exhibit C"; the order

being that starting on November 15, 1949, they make available to us the various documents, books, papers and objects designated in the subpoena itself.

In view of the affidavit I wish also to call to your Honor's attention the reply—as you might call it, and the
135 grounds set forth in the affidavit, under paragraph 7.

The grounds there listed in the affidavit under paragraphs (a), (b) and (c)—all small letters—in the Hotchkiss affidavit are exactly the same grounds that were set forth in the motion to quash the subpoena, filed on behalf of the Government—paragraph 7 of the motion pointing out further discrepancies in connection with the affidavit and the actual request of the subpoena.

By the Court: Is there anything further to be said in behalf of the United States or Mr. Hitchkiss?

By Mr. Hotchkiss: I think, your Honor, the statement which I submitted to the Court this morning covers the Government's position on the matter.

By the Court: Has the Government anything to say with respect to that part of the defendants' motion which asks for an order staying the further proceedings in the above-entitled cause?

By Mr. Hotchkiss: Your Honor, I question whether such an order would be proper in the premises of this proceeding—this case. There is a question as to whether such an order would be an appealable order; and the Criminal Rules, as I see them, do not provide for such relief on refusal to comply with the terms of the subpoena duces
136 tecum. The relief provided for is set forth in Rule 17(g).

By Mr. Hart: If the Court please, in connection with that statement, Rule 17(g) does provide that the court may find an individual who does not respond to a subpoena under that section, in contempt.

On the other hand, going back to Chapter 21 of the new statutes, and to Section 402 thereof, on contempt, it provides certain specific remedies which may be granted in specific instances of contempt, and thus allows the Court any discretion that it might have in the ordinary legal proceeding if the case does not fall within those specified cases.

This does not. It falls within the exception, that is, failure to comply with an order of the court. And we feel that your Honor would have the general common law rights.

Now, by analogy, under the Civil Rules one of the remedies for failure to respond to a subpoena is set forth in Rule

37 under Section (2) thereof, (i), or 35(i), where it states, "or staying further proceedings until the order is obeyed".

Now, we feel in view of Mr. Hotchkiss' affidavit which sets out that his position in this case is one dictated by the Attorney General—we feel that the case is one where perhaps the ordinary punishment for contempt is not
137 particularly appropriate; that the purpose of the court probably should be to seek the enforcement of the order the court entered, and we feel that the staying of proceedings is an appropriate way to enforce that order.

Now, if the Government, as it contends, claims that the court has exceeded its jurisdiction in entering the order it did, and granting the subpoena that has been granted, they have a way to test that, whether the order be one staying the proceedings, or fining the defendant or sentencing the defendant for any contempt.

By the Court: Well, I haven't any doubt about the power of the court to stay the proceedings. This is an adversary proceeding in which the United States is plaintiff. Mr. Hotchkiss is attorney for the plaintiff and stands in contempt of the court for refusal to exhibit to the defendants material which the court has held relevant to the issues.

Now, I cannot believe that even the United States can just come into a court of the United States where this material might be material which would conclusively negative the charges in this indictment—it might be and I
138 assume the defendants might think that the material will have some tendency to prove their innocence—now I cannot believe that the United States can stand in a court of justice and say, "We will not produce this evidence", and yet insist upon going ahead with the prosecution.

But I don't need to worry about that at the moment.

Have you a draft of an order—?

By Mr. Hart: We have not prepared one.

By the Court: (Continuing.) —adjudging Mr. Hotchkiss in contempt of court?

By Mr. Hart: We have not prepared one in that alternative way on that part of the motion. We would be glad to prepare and submit it at any time you wish.

By the Court: Suppose you do that, and bring it in tomorrow morning?

By Mr. Hart: Very well, sir.

Will you suggest which of the alternatives, or upon which of them you would wish it drawn?

By the Court: What?

By Mr. Hart: Our motion is that further proceedings be stayed.

By the Court: Well, I thought I had covered that.
139 Perhaps I was vague. I say it is unnecessary for me to determine as to whether I have such power or not. I think I have. But it is not necessary for me to exercise that power at the moment. And as to the exercise of the other alternative, that will doubtless give the United States an opportunity to test out the question as to whether or not the court is right.

Now, we might just as well think about this a moment. When the United States stands in this court or in any other court and says that it has a right to maintain in the files of its officers papers which may be relevant to the issues to be determined in court—when the United States says that it has a right to do that and to refuse such information to parties litigant, then it is taking a long, long step toward a police state.

That is exactly what you are doing. You might as well realize that, that if you are sustained in this position which you are taking here which you do by the direction of the Attorney General, then you and your associates are taking a long, long step toward a police state, and you are saying in effect that, "the court shall not determine whether papers which we have in our control have any bearing upon
140 these issues; we determine that, we, the police power of the United States are going to determine that, and the courts are not permitted to do that."

Now, if we are going to take that long, long step toward the police state which you propose to take, and which you will take right now—and will take if this court and other courts permit you, you do it without any voluntary co-operation. Some other court that has more power than I will say that you have a right to take that step, which I say is a step toward the police state.

Bring in an order tomorrow morning.

By Mr. Hart: Yes, sir.

(Whereupon the further hearing of the above-entitled matter was continued until the following day, January 5, 1950, at the hour of 10:00 o'clock a. m.)

141 Chicago, Illinois,
January 5, 1950,
10:00 o'clock a.m.

Met pursuant to adjournment.

Present:

Mr. Hotchkiss.
Mr. Ford.
Mr. Hart.
Mr. Tierney.
Mr. Cummings.
And other counsel.

142 And thereupon the following further proceedings were had herein:

By the Clerk: No. 48 CR. 360, United States *vs.* Bowman Dairy Company, et al.

By Mr. Hart: If the Court please, we have prepared that order.

By the Court: Have you circularized it?

By Mr. Hart: Yes, Mr. Ford and—

By the Court: Circulated, I guess would be better.

By Mr. Hart: Mr. Ford and Mr. Hotchkiss I believe have both seen it.

By Mr. Hotchkiss: That is correct.

By the Court: Any objection to the form of this order?

By Mr. Ford: No, sir.

By Mr. Hotchkiss: No objection to the form, your Honor.

144 And to wit, on the 4th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

145 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

ORDER.

This cause coming on to be heard pursuant to a Memorandum heretofore filed in the above entitled cause, dated December 27, 1949,

It Is Hereby Ordered, Adjudged And Decreed that the motion of the United States of America heretofore filed on November 28, 1949, to quash the Subpoena Duces Tecum served upon Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis Hotchkiss, Special Assistant to the Attorney General, pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, be and the same is hereby denied.

Enter:

By John P. Barnes,
Judge.

Dated: January 4, 1950.

146 And on the same day, to wit, the 4th day of January, 1950 came the Willis L. Hotchkiss, pro se, and filed in the Clerk's office of said Court his certain Statement Refusing To Comply With Order Of November 7, 1949 and Subpoena in words and figures following, to wit:

147 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

STATEMENT OF WILLIS L. HOTCHKISS, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL, REFUSING TO COMPLY WITH ORDER OF NOVEMBER 7, 1949 AND SUBPOENA.

State of Illinois, } ss.
County of Cook. }

Willis L. Hotchkiss, being duly sworn, states that he is employed by the United States Department of Justice as a Trial Attorney, and in that capacity is an authorized assistant of the Attorney General, and is Chief of the Midwest (Chicago) Office of the Antitrust Division, Department of Justice, Suite 820, 208 South LaSalle Street, Chicago 4, Illinois.

On November 1, 1949, there was served on him a subpoena directed to him and Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, United States Court House, Chicago, Illinois, calling on such attorneys for the Government to produce certain designated books,

records, documents, and objects, and such subpoena was accompanied by a draft order, tendered pursuant to the defendants' motions as filed June 13, 1949, for a subpoena for production of documentary evidence under Rule 17(c) of the Federal Rules of Criminal Procedure, directing the said attorneys for the Government to make available to the defendants and their attorneys, for inspection and copying or photographing, the books, papers, documents, and objects designated in the aforesaid subpoena.

148 Thereafter, on November 7, 1949, a hearing was had before this Court on defendants' motions for such subpoena under Rule 17(c) of the Federal Rules of Criminal Procedure, and this Court granted the said motion of the defendants and entered an order directing the said attorneys for the Government to make available, for inspection, copying or photographing by the defendants and their attorneys, the books, papers, and documents and objects designated in the aforesaid subpoena.

On November 28, 1949, the plaintiff, by its attorneys, filed a motion to quash the aforesaid subpoena and to set aside the aforesaid order of November 7, 1949 under which the attorneys for the Government are ordered to comply with the aforesaid subpoena. Upon the hearing of said motion to quash and set aside, both sides waived the filing of further briefs and the making of further arguments. The Court thereafter, on December 27, 1949, filed its memorandum opinion denying the Government's motion to quash the said subpoena and to set aside the order of November 7, 1949 with reference to such subpoena. An order pursuant to such memorandum opinion was entered by the Court on January 4, 1950.

Deponent states that he is, as Chief of the Midwest Office of the Antitrust Division, the custodian of all of the documents, books, papers, and objects designated in the aforesaid subpoena, and that none of such documents, books, records, or objects are in the possession or custody of Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and that the said Otto Kerner, Jr., is, therefore, unable to respond to the said subpoena and the order of this Court entered on November 7, 1949 with reference to said subpoena.

The Government makes the following contentions with respect to the aforesaid subpoena duces tecum and order:

149 (a) A subpoena for the production of books, papers, documents or other objects may not, under Rule 17(c) of the Federal Rules of Criminal Procedure, properly issue against an attorney for the Government;

(b) This Court acted outside the scope of its jurisdiction in ordering that Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, produce, for inspection and copying by the defendants and their attorneys, the books, papers, documents, and objects designated by a subpoena issued under Rule 17(c) of the Federal Rules of Criminal Procedure against such attorneys for the Government;

(c) The right of defendants in criminal proceedings to obtain access to books, papers, documents, or objects in the custody of attorneys for the Government, as such term is defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted to such defendants by Rule 16 of the Federal Rules of Criminal Procedure, and the application of such Rule 16 exhausts the rights of the defendants to secure access to such books, records, documents, or other objects in the custody of an attorney for the Government.

In addition, it is apparent, from the scope of designation of the aforesaid subpoena duces tecum, that it calls for the production of privileged documents, including, among others, documents which the Government might have secured from confidential and voluntary informants, and that the disclosure of such documents to defendants in criminal proceedings pursuant to subpoena issued under Rule 17(c) would be against public policy and would prevent and impede the Government in this and other criminal proceedings from securing from voluntary informants the benefit of their voluntary disclosure to the Government of information and documents relating to possible violations of the criminal statutes of the United States.

Deponent, for the foregoing reasons, and acting on the advice and instructions of the Attorney General of the United States and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, respectfully declines to produce for the defendants and their attorneys, pursuant to the terms of the aforesaid

order entered in this cause on November 7, 1949, any of the books, papers, documents, or other objects designated in the aforesaid subpoena issued under Rule 17(c).

Willis L. Hotchkiss.

Subscribed and sworn to before me this 4th day of January, 1950.

Kathryn M. Reilly.
Notary Public.

(Seal)

My commission expires March 23, 1953.

151 And on the same day, to wit, the 4th day of January, 1950 came the Defendants by their respective attorneys and filed in the Clerk's office of said Court their certain Motion To Enter An Appropriate Order With Respect To The Refusal Of Willis L. Hotchkiss, Special Assistant To The Attorney General, To Comply With A Subpoena Duces Tecum And With An Order Of This Court Entered Herein On November 7, 1949, in words and figures following, to wit:

152 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

MOTION TO ENTER AN APPROPRIATE ORDER WITH RESPECT TO THE REFUSAL OF WILLIS L. HOTCHKISS, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL, TO COMPLY WITH A SUBPOENA DUCES TECUM AND WITH AN ORDER OF THIS COURT ENTERED HEREIN ON NOVEMBER 7, 1949.

Defendants represent to the Court as follows:

1. That on November 1, 1949, at defendants' request, the Clerk of this Court issued a Subpoena Duces Tecum directed to Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, commanding them to diligently and carefully search for, examine, and inquire after and bring with them and produce, at a time and place to be specified by order of this Court, certain documents, books, papers, and objects designated in said

Subpoena, a copy of which Subpoena Duces Tecum is attached hereto as Exhibit A.

2. Service of the said Subpoena Duces Tecum was made upon Otto Kerner, Jr. on November 3, 1949, and Willis L. Hotchkiss on November 1, 1949, at their usual places of business in Chicago, Illinois, by delivering a copy thereof to them and by tendering them the fees for one day's attendance and the mileage allowed by law as more
153 fully appears from the affidavits of Charles F. Simon, attached hereto as Exhibit B.

3. That thereafter, on November 7, 1949, pursuant to stipulation, there came on to be heard by this Court the matter of settling the time and place at which the documents, books, papers and objects designated in the said Subpoena should be produced by the said Otto Kerner, Jr. and Willis L. Hotchkiss for inspection by the defendants, and that this Court, having heard and considered the arguments of counsel and having read and considered the briefs presented by counsel in support of their positions, ordered that such documents, books, papers and objects be produced for inspection by the defendants at the Office of the Department of Justice, Anti-Trust Division, located at 208 South LaSalle Street, Chicago, Illinois, on November 15, 1949, and that such inspection and examination continue thereafter until completed. A copy of such order is attached hereto as Exhibit C.

4. That thereafter, the date for the production of such documents, books, papers and objects was, in accordance with stipulation, continued to November 28, 1949. That thereafter on to-wit, November 28, 1949, a certain motion to quash the said Subpoena Duces Tecum was filed on behalf of the United States of America, plaintiff in the above entitled cause, a copy of which motion to quash the Subpoena Duces Tecum is attached hereto and marked Exhibit D.

5. That thereafter on to-wit, January 4, 1950, pursuant to a Memorandum filed in the above entitled cause by the Court, and without further notice in accordance with such Memorandum, an order dated January 4, 1950, deny-
154 ing the motion to quash such Subpoena Duces Tecum was entered by this Court, a copy of which order is attached hereto as Exhibit E.

6. That the said Willis L. Hotchkiss, Special Assistant to the Attorney General, on January 4, 1950, filed an affi-

davit (hereto attached and marked Exhibit F) in open court stating that he refuses to comply with the said Subpoena and order of the Court heretofore entered on November 7, 1949 (hereto attached and marked Exhibit C), and that he will continue to refuse and fail to comply with the said order and the said Subpoena Duces Tecum (hereto attached and marked Exhibit A), which refusal is without adequate excuse.

7. The grounds set forth in said affidavit as the basis for the refusal to comply with said Subpoena Duces Tecum do not constitute an adequate excuse for such refusal for the following reasons:

(a) The affidavit incorrectly characterizes the Subpoena as calling "for the production of privileged documents," but it does not appear from said affidavit or otherwise that the affiant has in his custody any privileged documents coming within the purview of said Subpoena.

(b) The Subpoena expressly excludes "memoranda prepared by Government counsel and documents or papers solicited by or volunteered to Government counsel, which consist of narrative statements of persons or memoranda of interviews."

(c) Contrary to said affidavit, the Subpoena Duces Tecum does not require the Government to disclose "Information" relating to possible violation of the crim-
155 inal statutes of the United States.

(d) Affiant has refused the production of "any of the books, papers, documents, or other objects designated in the aforesaid Subpoena issued under Rule 17(c)" and such refusal is without limitation or qualification.

(e) The grounds stated in clauses (a), (b) and (c) of the Hotchkiss affidavit, and the statements with regard to public policy thereafter appearing therein, amount to a statement that it is contrary to public policy for the Court to permit defendants to exercise the privileges conferred upon them by Rule 17(c) of the Federal Rules of Criminal Procedure. Said affidavit constitutes a request that the Court amend or abrogate the Federal Rules of Criminal Procedure.

Wherefore defendants move the Court for an order staying further proceedings in the above entitled cause, or, adjudging the said Willis L. Hotchkiss in contempt of this Court, until such time as he shall obey the Subpoena Duces Tecum, hereto attached and marked Exhibit A, and

the order of this Court entered on November 7, 1949, hereto attached and marked Exhibit C.

Bowman Dairy Company	William R. Boruszak
American Processing and Sales Company	Hyman I. Freed
	H. H. Inglehart
Beloit Dairy Company	Walter F. Kettell
The Borden Company	O. N. Koenig
Capitol Dairy Company	Francis H. Kullman, Jr.
Hunding Dairy Company	S. D. McGuire
Meadowmoor Dairies, Inc.	D. Cameron Peck
Western United Dairy Company	O. O. Smaha

By their respective attorneys.

L. Edward Hart, Jr.

156 Exhibit A.

SUBPOENA DUCES TECUM.

Case No. 48 Cr. 360.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

Northern District of Illinois.

The President of the United States of America to Otto Kerner, Jr., Esq., United States Attorney for the Northern District of Illinois, U. S. Court House, Chicago, Illinois, and Willis Hotchkiss, Esq., Special Assistant to the Attorney General, Suite 826, 208 S. LaSalle Street, Chicago, Illinois,—Greeting:

We Command You, that all business and excuses being laid aside, you and each of you attend before the Honorable John P. Barnes, one of the Judges of the District Court of the United States for said District, at a time and place to be specified in an order of said Court, in a certain cause now pending and undetermined in said Court, wherein United States of America is Plaintiff and Bowman Dairy Company, et al., are Defendants, on the part of the defendants And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, all documents, books, papers and objects (except memoranda prepared

by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshal of the Northern District of Illinois to execute and return in due form of law.

Witness, the Honorable John P. Barnes, Judge of the said Court, at Chicago, in said District, this 1st day of November, in the year of our Lord one thousand nine hundred and 49 and of the Independence of the United States of America the 174th year.

Roy H. Johnson,
Clerk.

(Seal Copy)

Endorsed: District Court of the United States * * (Caption—48-Cr.-360) * * Subpoena Duces Tecum. Montgomery, Hart, Pritchard & Herriott, 120 S. LaSalle St., Chgo., Ill.; Mayer, Meyer, Austrian & Platt, 231 S. LaSalle St., Chgo., Ill.; Sidley, Austin, Burgess & Harper, 11 S. LaSalle St., Chgo., Ill.; Campbell, Clithero & Fischer, 1 N. LaSalle St., Chgo., Ill.; Isidore and Herbert B. Fried, 111 W. Monroe St., Chgo., Ill.; Packard, Barnes, Schumacher, Gilmore & Van Ness, 35 S. Dearborn, Chgo., Ill.; Charles W. Schaub, 120 S. LaSalle St., Chgo., Ill., Attorneys for Defendants.

157 Exhibit B.

UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

AFFIDAVIT OF SERVICE OF SUBPOENA.

State of Illinois, } ss.
County of Cook. }

Charles F. Simon, being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 2209 Ridge Avenue, Evanston, Illinois. On the 1st day of November, 1949, at 208 South La Salle Street, Chicago, Illinois, I served the annexed subpoena duces tecum on Willis L. Hotchkiss, United States Attorney, by exhibiting to him the original subpoena and delivering to and leaving personally with him a true copy thereof, and at the same time tendered to him the sum of Four Dollars and Fourteen Cents ($4.14), the fee required by law for attendance at Court as witness in the above entitled proceeding. The aforementioned witness fee was accepted refused by the said Willis L. Hotchkiss. At the time of such service I knew the said Willis L. Hotchkiss to be the individual mentioned and described in said subpoena duces tecum.

/s/ Charles F. Simon.

Subscribed and sworn to before me this 1st day of November, 1949.

.....

Notary Public.

My Commission Expires .....

158 Exhibit C.

UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

ORDER.

This matter coming on to be heard on the defendants' motions for a subpoena for production of documentary evidence pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, and the Court having heard and considered the arguments of counsel and having read and considered the briefs presented by counsel in support of their positions,

It Is Ordered that the books, papers, and documents designated in the subpoena directed to Otto Kerner, Jr., Esq., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Esq., Special Assistant to the Attorney General, a copy of which is attached hereto, be produced by the Government at the office of the Department of Justice, Antitrust Division, located at 208 South La Salle Street, Chicago, Illinois, on November 15, 1949, and that the defendants and their attorneys, proceeding with reasonable dispatch, be permitted to inspect and copy

159 or photograph such books, papers and documents on the date specified above and succeeding days, and that the Government attorneys make available suitable accommodations for such inspection and copying or photographing, and

It Is Further Ordered that except as hereinabove provided the defendants' motions for a subpoena for production of documentary evidence, pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure be, and the same hereby are denied.

/s/ John P. Barnes,
United States District Judge.

Dated: November 7, 1949.

160 Exhibit D.

UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

MOTION TO QUASH SUBPOENA.

The United States of America, by its attorneys, moves to quash (a) the subpoena served November 1, 1949, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, at the instance of the defendants herein, on Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, and (b) set aside the order entered by this Court on November 7, 1949, directing the said attorneys for the Government to produce for inspection and copying by the defendants the books, papers, documents, and objects designated in the aforesaid subpoena.

The grounds for this motion to quash are that:

(a) A subpoena for the production of books, papers, documents or other objects may not, under Rule 17(c) of the Federal Rules of Criminal Procedure, issue against an attorney for the Government;

(b) This Court acted outside the scope of its jurisdiction in ordering that Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, produce, for inspection and copying by the defendants
161 and their attorneys, the books, papers, documents and objects designated by a subpoena issued under Rule 17(c) of the Federal Rules of Criminal Procedure against such attorneys for the Government;

(c) The right of defendants in criminal proceedings to obtain access to books, papers, documents, or objects in the custody of attorneys for the Government, as such term is defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted to such defendants by Rule 16 of the Federal Rules of Criminal Procedure, and the application of such Rule 16 exhausts the rights of the defendants to secure access to such books, records, documents, or other objects in the custody of an attorney for the Government.

s/ Willis L. Hotchkiss,
Special Assistant to the Attorney General,
Suite 820,
208 South La Salle Street,
Chicago 4, Illinois,
Central 6-6886.

162 Exhibit E.

UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

ORDER.

This cause coming on to be heard pursuant to a Memorandum heretofore filed in the above entitled cause, dated December 27, 1949,

It Is Hereby Ordered, Adjudged And Decreed that the motion of the United States of America heretofore filed on November 28, 1949, to quash the Subpoena Duces Tecum served upon Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis Hotchkiss, Special Assistant to the Attorney General, pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, be and the same is hereby denied.

Enter:

By .....,

Dated: January 4, 1950. *Judge.*

163 Exhibit F.

UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

STATEMENT OF WILLIS L. HOTCHKISS, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL, REFUSING TO COMPLY WITH ORDER OF NOVEMBER 7, 1949 AND SUBPOENA.

State of Illinois, } ss.
County of Cook. }

Willis L. Hotchkiss, being duly sworn, states that he is employed by the United States Department of Justice as a Trial Attorney, and in that capacity is an authorized assistant of the Attorney General, and is Chief of the Midwest (Chicago) Office of the Antitrust Division, Department of Justice, Suite 820, 208 South LaSalle Street, Chicago 4, Illinois.

On November 1, 1949, there was served on him a subpoena directed to him and Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, United States Court House, Chicago, Illinois, calling on such attorneys for the Government to produce certain designated books, records, documents, and objects, and such subpoena was accompanied by a draft order, tendered pursuant to the defendants' motions as filed June 13, 1949, for a subpoena for production of documentary evidence under Rule 17(c) of the Federal Rules of Criminal Procedure, directing the said attorneys for the Government to make available to the defendants and their attorneys, for inspection and copying or photographing, the books, papers, documents, and objects designated in the aforesaid subpoena.

164 Thereafter, on November 7, 1949, a hearing was had before this Court on defendants' motions for such subpoena under Rule 17(c) of the Federal Rules of Criminal Procedure, and this Court granted the said motion of the defendants and entered an order directing the said attorneys for the Government to make available, for inspection, copying or photographing by the defendants and their attorneys, the books, papers, and documents and objects designated in the aforesaid subpoena.

On November 28, 1949, the plaintiff, by its attorneys, filed a motion to quash the aforesaid subpoena and to set aside the aforesaid order of November 7, 1949 under which the attorneys for the Government are ordered to comply with the aforesaid subpoena. Upon the hearing of said motion to quash and set aside, both sides waived the filing of further briefs and the making of further arguments. The Court thereafter, on December 27, 1949, filed its memorandum opinion denying the Government's motion to quash the said subpoena and to set aside the order of November 7, 1949 with reference to such subpoena. An order pursuant to such memorandum opinion was entered by the Court on January 4, 1950.

Deponent states that he is, as Chief of the Midwest Office of the Antitrust Division, the custodian of all of the documents, books, papers, and objects designated in the aforesaid subpoena, and that none of such documents, books, records, or objects are in the possession or custody of Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and that the said Otto Kerner, Jr., is, therefore, unable to respond to the said subpoena and the order

of this Court entered on November 7, 1949 with reference to said subpoena.

The Government makes the following contentions with respect to the aforesaid subpoena duces tecum and order:

165 (a) A subpoena for the production of books, papers, documents or other objects may not, under Rule 17(c) of the Federal Rules of Criminal Procedure, properly issue against an attorney for the Government;

(b) This Court acted outside the scope of its jurisdiction in ordering that Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, produce, for inspection and copying by the defendants and their attorneys, the books, papers, documents, and objects designated by a subpoena issued under Rule 17(c) of the Federal Rules of Criminal Procedure against such attorneys for the Government;

(c) The right of defendants in criminal proceedings to obtain access to books, papers, documents, or objects in the custody of attorneys for the Government, as such term is defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted to such defendants by Rule 16 of the Federal Rules of Criminal Procedure, and the application of such Rule 16 exhausts the rights of the defendants to secure access to such books, records, documents, or other objects in the custody of an attorney for the Government.

In addition, it is apparent, from the scope of designation of the aforesaid subpoena duces tecum, that it calls for the production of privileged documents, including, among others, documents which the Government might have secured from confidential and voluntary informants, and that the disclosure of such documents to defendants in criminal proceedings pursuant to subpoena issued under Rule 17(c) would be against public policy and would prevent and impede the Government in this and other criminal proceedings from securing from voluntary in-

166 formants the benefit of their voluntary disclosure to the Government of information and documents relating to possible violations of the criminal statutes of the United States.

Deponent, for the foregoing reasons, and acting on the advice and instructions of the Attorney General of the

United States and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, respectfully declines to produce for the defendants and their attorneys, pursuant to the terms of the aforesaid order entered in this cause on November 7, 1949, any of the books, papers, documents, or other objects designated in the aforesaid subpoena issued under Rule 17(c).

Willis L. Hotchkiss.

Subscribed and sworn to before me this ..... day of ....., 1950.

.....,
Notary Public.

My commission expires March 23, 1953.

167 And on the same day, to wit, on the 4th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

168 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

This day comes the United States by the United States Attorney come also the defendants by counsel and present herein a motion that Willis L. Hotchkiss, Special Assistant to the Attorney General of the United States, be held in contempt of Court which motion is entered and continued to January 5, 1950, at 10:00 o'clock A.M. for the entry of an order adjudging said Willis L. Hotchkiss in contempt of Court.

169 And afterwards, to wit, on the 5th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears to following entry, to wit:

170 UNITED STATES DISTRICT COURT.
(Caption—48-Cr.-360)

ORDER.

This Matter coming on to be heard upon motion of the defendants that Willis L. Hotchkiss be found guilty of contempt of this Court, by reason of his refusal to produce certain books, papers, documents and objects in his custody, pursuant to a subpoena duces tecum directing their production, and by reason of his refusal to comply with the order of this Court entered herein on November 7, 1949;

And said Willis L. Hotchkiss having filed herein his affidavit, in and by which affidavit he has stated that he declines to produce any of the said books, papers, documents or other objects designated in the said subpoena;

And said Willis L. Hotchkiss having persisted in said refusal by statements made by him in open Court;

The Court having considered the premises and the motion filed with respect thereto by the defendants, and having heard the arguments of counsel, and being fully advised in the premises, Finds said Willis L. Hotchkiss guilty of contempt of this Court in refusing to produce the books, papers, documents an dobjects designated in the subpoena duces tecum and in refusing to comply with the order of this Court entered in the above entitled cause on
171 November 7, 1949.

It Is Ordered And Adjudged that the said Willis L. Hotchkiss be, and he is hereby, committed to the custody of the Attorney General, or his authorized representative, to be held by the said Attorney General until said Willis L. Hotchkiss shall obey the order of this Court and shall comply with the provisions of the said subpoena duces tecum and said order entered on November 7, 1949, or until he shall be discharged from such custody by due process of law.

It Is Further Ordered that the United States Marshal take the said Willis L. Hotchkiss into custody forthwith.

Enter:

John P. Barnes,
Judge.

Dated: January 5, 1950.

172 And on the same day, to wit, the 5th day of January, 1950 came Willis L. Hotchkiss, Special Assistant To The Attorney General, pro se and by his Attorney, and filed in the Clerk's office of said Court his certain Notice Of Appeal in words and figures following, to wit:

173 UNITED STATES DISTRICT COURT.

Northern District of Illinois,

Eastern Division.

United States of America, *vs.* Bowman Dairy Company, et al.	Criminal Case No. 48 Cr. 360.

NOTICE OF APPEAL.

Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, attorney for Willis L. Hotchkiss, Special Assistant to the Attorney General, and the said Willis L. Hotchkiss, pro se, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the judgment and Order entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, on the 5th day of January, 1950, holding Willis L. Hotchkiss, Special Assistant to the Attorney General, in contempt and committing him to the custody of the United States Marshal for refusing to produce for the defendants in this cause certain books, papers, and documents designated in a subpoena served upon the said Willis L. Hotchkiss.

Otto Kerner, Jr.,
United States Attorney.

Willis L. Hotchkiss,
Special Assistant to the Attorney General.

Filed:

(Certificate of Mailing Attached Hereto):

174 United States of America,
Northern District of Illinois. } ss.

Certificate of Mailing.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on January 6, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to: Mayer, Meyer, Austrian and Platt, 231 South La Salle Street, Chicago 4, Illinois; Campbell, Clithero & Fisher, C. L. Fisher, 1 North La Salle Street, Chicago 2, Illinois; Edwin Clark Davis & Joseph A. Greaves, 221 North La Salle Street, Chicago 1, Illinois; William R. Boruszak, Packard, Barnes, Schumacher, Gilmore & Van Ness, 38 South Dearborn Street, Chicago 3, Illinois; Howard Neitzert & Lloyd S. McClelland, Sidley, Austin Burgess & Harper, 11 South La Salle Street, Chicago 3, Illinois; Louis E. Hart & Edward Hart, Jr., 120 South La Salle Street, Chicago 3, Illinois; Leo F. Tierney & Donald M. Graham, 231 South La Salle Street, Chicago 4, Illinois; Isadore & Herbert B. Fried, 111 West Monroe Street, Chicago, Illinois; Charles M. Schaub, 139 North Clark Street, Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois. this 6th day of January, 1950.

Roy H. Johnson,
Clerk.

By Gizella Butcher,
Deputy Clerk.

(Seal)

175 And on the same day, to wit, the 5th day of January, 1950 there was filed in the Clerk's office of said Court a certain Certified Copy Of An Order Entered January 5, 1950, By The Honorable J. Earl Major, Chief Judge, United States Court Of Appeals, For the Seventh Circuit, in words and figures following, to wit:

176 UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

January 5, 1950.

Before

J. Earl Major, Chief Judge.

No. 10,080.

United States of America, *vs.* Bowman Dairy Company, et al.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Appeal of: Willis L. Hotchkiss.

On application of counsel for the appellant, Willis L. Hotchkiss, it is ordered that the said appellant be admitted to bail until the further order of this Court, upon the filing in this Court of a good and sufficient bond in the amount of $1,000.00 and released upon his own recognizance.

It is further ordered by the Court that the bail bond of appellant, Willis L. Hotchkiss, filed this day in this cause be, and the same is hereby, approved.

/s/ J. Earl Major.

A True Copy.

Teste.

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

177 And afterwards on, to wit, the 13th day of January, 1950 came the Appellant, pro se and by his attorneys and filed in the Clerk's office of said Court his certain Statement Of Points Relied Upon On Appeal in words and figures following, to wit:

178 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

STATEMENT OF POINTS RELIED UPON ON APPEAL.

Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, attorney for the appellant, Willis L. Hotchkiss, and the said Willis L. Hotchkiss pro se, will rely upon the following points on appeal:

1. The subpoena duces tecum under Rule 17(c) of the Rules of Criminal Procedure, served November 1, 1949, although nominally directed against Otto Kerner, Jr. and appellant, Willis L. Hotchkiss, is in substance directed against the sovereign.

2. The sovereign is not a "person" as such word is used in Rule 17(c) of the Rules of Criminal Procedure or in Section 1, U. S. C. 1.

3. The appellant is an attorney for the Government within the meaning of Rule 54(c) of the Federal Rules of Criminal Procedure.

4. On attorney for the Government is an agent of the sovereign, and as such is not "a person" as such word is used in Rule 17(c) of the Federal Rules of Criminal Procedure or in Section 1, U. S. C. 1.

5. A subpoena for the production of books, papers, documents, and other objects may not properly, under Rule 17(c) of the Federal Rules of Criminal Procedure, issue against the Government or an attorney for the Gov-

179 ernment.

6. The right of defendants in criminal proceedings to obtain access to books, papers, documents, or objects in the custody of attorneys for the Government is governed by the Federal Rules of Criminal Procedure and is limited, under such Rules, to the rights granted to such defendants by Rule 16 of the Federal Rules of Criminal Procedure, and the application of such rule exhausts such rights of the defendants.

7. Access by the defendants and their attorneys to the

books, papers, documents, and objects designated in the subpoena served upon Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and the appellant, November 1, 1949, could not lawfully have been secured under Rule 16.

8. The subpoena served November 1, 1949, at the instance of the defendants upon Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, appellant here, was without legal sanction and effect under Rule 17(c) of the Federal Rules of Criminal Procedure.

9. The United States District Court erred in entering the order of November 7, 1949, directing Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, to produce, for inspection and copying by the defendants and their attorneys, books, papers, documents, and objects designated in the subpoena duces tecum issued under Rule 17(c) of the Federal Rules of Crim-
180 inal Procedure against such attorneys for the Government.

10. The appellant, Willis L. Hotchkiss, not being a "person" within the meaning of Rule 17(c), acted lawfully in refusing, on instructions of the Attorney General, to comply with the order of the United States District Court directing appellant to make available to the defendants and their attorneys, for inspection and copying, the books, papers, documents, and objects designated in the subpoena duces tecum served upon the said appellant November 1, 1949.

11. The United States District Court erred in punishing the appellant as in contempt for refusing to comply with the order of the said Court directing appellant to make available to the defendants and their attorneys, for inspection and copying, the books, papers, documents, and objects in his custody designated in the subpoena duces tecum served upon such appellant November 1, 1949.

12. Under the constitutional doctrine of separation of powers, the judicial branch of the Government is without power or authority over the books, records, papers, and objects of the executive branch.

Willis L. Hotchkiss,
Appellant pro se.

Otto Kerner, Jr.,
United States Attorney.

Dated: January 13, 1950.

181 And on the same day to wit, the 13th day of January, 1950 came the Appellant, pro se and by his attorneys and filed in the Clerk's office of said Court his certain Designation Of Contents Of Record On Appeal in words and figures following, to wit:

182 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

The Clerk is hereby directed to prepare certified copies of the following, for transmittal to the United States Court of Appeals for the Seventh Circuit, as the record on appeal:

1. Indictments filed July 30, 1948.

2. Several motions for a subpoena duces tecum in accordance with Rule 17(c) of the Federal Rules of Criminal Procedure, filed June 13, 1949, by all defendants, to wit:

(a) By American Processing and Sales Company;

(b) By Beloit Dairy Company and S. D. McGuire;

(c) By The Borden Company, H. H. Inglehart, O. N. Koenig, and O. O. Smaha;

(d) By Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck;

(e) By Capitol Dairy Company and Hyman I. Freed;

(f) By Hunding Dairy Company, Western United Dairy Company, and William Boruszak;

(g) By Meadowmoor Dairies, Inc.

3. Several motions for discovery and inspection in accordance with Rule 16 of the Federal Rules of Crim-

183 inal Procedure, filed June 13, 1949, by all defendants, to wit:

(a) By American Processing and Sales Company;

(b) By Beloit Dairy Company and S. D. McGuire;

(c) By The Borden Company, H. H. Inglehart, O. N. Koenig, and O. O. Smaha;

(d) By Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck;

(e) By Capitol Dairy Company and Hyman I. Freed;

(f) By Hunding Dairy Company, Western United Dairy Company, and William Boruszak;

(g) By Meadowmoor Dairies, Inc.

4. Order that several motions of all defendants for discovery under Rule 16 and for a subpoena duces tecum under Rule 17(c) is granted and draft order be prepared, entered October 24, 1949.

5. Subpoena duces tecum directed to Otto Kerner, Jr. and Willis L. Hotchkiss for production of documents, together with affidavit of service of subpoena on Willis L. Hotchkiss, filed November 1, 1949.

6. Order on stipulation that defendants' motions to settle orders in connection with defendants' motions under Rules 16 and 17(c) be set for hearing on November 7, 1949, entered November 2, 1949.

7. Order that Government produce on November 15, 1949, and defendants proceed to inspect and copy documents specified in subpoena duces tecum served November 1, 1949, entered November 7, 1949.

8. Order on stipulation that order dated November 7, 1949, directing Otto Kerner, Jr. and Willis L. Hotchkiss to produce certain books, papers, and documents des-
184 ignated in subpoena duces tecum is amended by changing the return date from November 15, 1949, to November 28, 1949, entered November 14, 1949.

9. Motion by Government to quash subpoena duces tecum served on November 1, 1949, and to set aside order entered on November 7, 1949, filed November 28, 1949.

10. Order, by agreement, that further arguments and briefs are waived and Government's motion to quash subpoena taken under consideration, entered November 28, 1949.

11. Memorandum opinion of the District Court that Government's motion to quash the subpoena issued November 1, 1949, and to set aside the order entered on November 7, 1949 be denied, filed December 27, 1949.

12. Order that motion of the United States to quash the subpoena duces tecum served upon Willis L. Hotchkiss is denied, entered January 4, 1950.

13. Sworn statement of Willis L. Hotchkiss, refusing to comply with the subpoena duces tecum served upon him November 1, 1949 and to comply with the order of November 7, 1949, filed January 4, 1950.

14. Motion of the defendants for an appropriate order for the refusal of Willis L. Hotchkiss to comply with the subpoena duces tecum served upon him November 1, 1949,

together with exhibits A, B, C, D, E, and F attached thereto, filed January 4, 1950.

15. Order on defendants' motion that Willis L. Hotchkiss be held in contempt of court; that hearing be continued to January 5, 1950 for entry of order adjudging said Willis L. Hotchkiss in contempt.

16. Order finding Willis L. Hotchkiss guilty of contempt of court, committing the said Willis L. Hotch-
185 kiss to the custody of the Attorney General, and ordering the United States Marshal to take him into custody, entered January 5, 1950.

17. Notice of appeal of Willis L. Hotchkiss to the United States Court of Appeals for the Seventh Circuit, and proof of service thereof.

18. Order of the Senior Judge of the Court of Appeals for the Seventh Circuit releasing appellant, Willis L. Hotchkiss, from custody on his own recognizance, filed January 5, 1950.

19. Transcript of proceedings had on November 7, 1949; transcript of proceedings had on January 4, 1950; and transcript of proceedings had on January 5, 1950.

20. All docket entries in this above numbered case.

21. Statement of points relied upon on appeal, filed January 13, 1950.

22. This, appellant's designation of contents of record on appeal.

Willis L. Hotchkiss,
Appellant pro se.

Otto Kerner, Jr.,
United States Attorney.

Dated: January 13, 1950.

186 And afterwards on, to wit, the 20th day of January, 1950 came the Appellees by their attorneys and filed in the Clerk's office of said Court their certain Designation Of Additional Portions Of Record, Proceedings, And Evidence To Be Included On Appeal in words and figures following, to wit:

187 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE INCLUDED ON APPEAL.

The Clerk is hereby directed to prepare certified copies of the following for transmittal to the United States Court of Appeals for the Seventh Circuit as the record on appeal:

1. Order that Government produce on November 15, 1949, and defendants proceed to inspect and copy documents received by the Government in response to the several Grand Jury Subpoenas Duces Tecum listed on Exhibit A thereto attached which by reference was made a part thereof, entered November 7, 1949.

2. Order impounding documents received under Subpoenas issued and to be issued in the custody of Melville C. Williams, Chief of the Midwest Office, Anti-Trust Division, Department of Justice, and his successors, entered in Grand Jury Proceedings No. 8949 which Grand
188 Jury returned the indictment in this cause, entered September 17, 1947.

3. Appellees' additional designation of contents of record on appeal.

Louis E. Hart,
L. Edward Hart, Jr.,
Leo F. Tierney,
Donald M. Graham,
Attorneys for Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr. and D. Cameron Peck.

Herman A. Fischer,
Carlton L. Fischer,
Attorneys for American Processing & Sales Company.

Leo F. Tierney,
Donald M. Graham,
Attorneys for Beloit Dairy Company and S. D. McGuire.

Howard Neitzert,
Edwin Clark Davis,
Walter J. Cummings, Jr.,
Joseph A. Greaves,
Attorneys for The Borden Company, O. O. Smaha, O. N. Koenig and H. H. Inglehart.

Isidore Fried,
Herbert B. Fried,
Attorneys for Capitol Dairy Company and Hyman I. Freed.

Thomas B. Gilmore,
Attorney for Hunding Dairy Company, Western United Dairy Company and William R. Boruszak.

Charles W. Schaub,
Attorney for Meadowmoor Dairies, Inc.

Dated: January 20, 1950.

189 UNITED STATES DISTRICT COURT.
(Caption—48-Cr.-360)

PROOF OF SERVICE.

Received this 20th day of January, 1950, a copy of Appellees' Designation of Additional Portions of Record, Proceedings and Evidence to be Included on Appeal.

Otto Kerner, Jr.,
United States Attorney,
Willis L. Hotchkiss,
Appellant pro se.

190 And, to wit, on the 17th day of September, 1947, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in Grand Jury Proceedings, No. 8949, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

191 *In the Examination of Matters Before the Special Grand Jury to Be Impaneled in the Northern District of Illinois on September 22, 1947.*

Grand Jury No. 8949.

ORDER GRANTING APPLICATION TO IMPOUND DOCUMENTS.

Upon the application of Willis L. Hotchkiss, Special Assistant to the Attorney General:

It Is Ordered that all documents produced or to be produced pursuant to the terms of the subpoena duces tecum heretofore issued herein be impounded in the custody of Melville C. Williams, Chief of the Chicago Office, Antitrust Division, Department of Justice, 208 South La Salle Street, Chicago 4, Illinois, and his successors, excepting those documents voluntarily deposited with Government counsel by the witnesses so subpoenaed, and also excepting therefrom, all such documents as Government counsel determine may not be necessary to be presented to the grand jury and are returned to the witnesses.

The witnesses producing documents, together with their counsel, upon making reasonable arrangements with Government counsel, shall have access to those documents produced by them.

This order relates specifically to the subpoena duces tecum issued and to be issued and the production of documents to be presented to the grand jury to be impaneled in the Northern District of Illinois on September 22, 1947, which grand jury proceedings are numbered 8949.

Such documents as may become impounded hereunder shall be retained in the custody of said Melville C.
192 Williams, Chief of the Chicago Office, Antitrust Division, Department of Justice, and his successors, pur-

suant to the terms of this order, and shall not be released to any of the witnesses or their counsel without approval of Government counsel, or until the further order of this Court.

Enter:

Barnes,
Judge.

Dated: September 17, 1947.

193 48 Cr. 360—U. S. A. *vs.* Bowman Dairy Company et al. The following are the Docket Entries.

CRIMINAL DOCKET

JUDGE BARNES

CALENDAR

38 CR 360

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. BOWMAN DAIRY COMPANY; AMERICAN PROCESSING AND SALES COMPANY; BELOIT DAIRY COMPANY; THE BORDEN COMPANY; CAPITOL DAIRY COMPANY; HUDDING DAIRY COMPANY; MEADOW-MOOR DAIRIES, INC.; WESTERN UNITED DAIRY CO.; WILLIAM R. BORUSZAK; HYMAN I. FREED; H. H. INGLEHART; WALTER F. KETTELL; O. N. KOENIG; FRANCIS H. KULLMAN, JR.; S. D. McGUIRE; D. CAMERON PECK; and O. O. SWAHA, Defendants.	For U. S.: Otto Kerner, Jr. U.S.Atty. Willis L. Kerchkoff, Spec'l Ast to Atty General 525 - 208 S. LaSalle St Chgo 4 For Defendant: see list for attorneys

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,					
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
7-30-48	VIOLATION OF SECTION ONE OF THE ACT OF JULY 2, 1890 (U.S.C., TITLE 15, SEC. 1.)		

48 D 60

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
7-30-48	Filed Indictment. (9) (JSC)	1500	
" " "	Issued 17 summons and copies with copies of indictment.		
" " "	Order to issue summons for each corporation; to issue summons for each individual defendant and to fix bonds at $1000. each, and that summons as to each defendant be returnable Monday, September 13, 1948.		
8-11-48	Filed Summons returned executed as to E.H. Inglehart $2.54		
8-11-48	Filed Summons returned executed as to Hyman I. Freed $2.90		
8-11-48	Filed Summons returned executed as to American Processing and Sales Co. $2.00		
8-11-48	Filed Summons returned executed as to Western United Dairy $2.00		
8-11-48	Filed Summons returned executed as to Meadowmoor Dairies Inc. $2.35		
8-13-48	Filed Summons returned executed as to Beloit Dairy Co. $2.78		
8-13-48	Filed Summons returned executed as to Bowman Dairy Co. $2.00		
8-20-48	Filed Summons returned executed as to S.S. McClure		
8-20-48	Filed summons retd executed as to Hundley Dairy Co		
8-20-48	Filed summons retd executed as to Capitol Dairy Co		
9-3-48	Order that portion of order entd July. , 48 , requiring bond, vacated Draft - LaBuy, J (Mailed notice 9-7-48 (		
9-13-48	Filed 14 appearances -see list		
9-13-48	Filed (2) Consent Pursuant To Rule 42 -O.O.Smaha, O.N.Koenig and E.H.Inglehart		
9-13-48	Filed summons retd served on O.N.Koenig, Walter F. Kettell, The Borden Dairy Co, Francis H. Kullman, Jr. and D. Cameron Peck - Service 10.55		
9-13-48	Filed summons retd not found as to Smaha		
9-20-48	Filed Notice (Bowman Dairy Co et al		
9-20-48	Filed Notice and Proof Of Service (U.S.)		
9-20-48	On mo of Govt and defts order deft to file mot to dismiss indictment and supporting briefs within 20 days Govt. to file answering briefs within 15 days from date, defts to file reply brief 10 days from date, mot on said mos set for Feb 7,1949 and arraignment and plea contd generally pending dispn of said motions -Barnes, J. Mailed notice 9-21-48		
9-21-48	Filed summons retd not found as to Bornemak		
12-20-48	Filed Notice and Motion To Dismiss Indictment of Capitol Dairy Company and Hyman I. Freed		
12-20-48	Filed Motion and copy of Meadowmoor Dairy, Inc. To Dismiss Indictment and Receipt		
12-20-48	Filed Additional Brief and copy of Meadowmoor Dairies, Inc. and Receipt		

CIVIL DOCKET 48 CR 360

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT RECEIVED IN ENRICHMENT RETURNS
12-20-48	Filed Notice and Motion To Dismiss The Indictment Of American Processing and Sales Company			
12-20-48	Filed Notice and Motion To Dismiss The Indictment of Bowman Dairy Co. Walter F. Kettell, Francis H. Kullman, Jr. and D. Cameron Peck			
12-20-48	Filed Motion Of Defendants, Beloit Dairy Company and S. D. McGuire to Dismiss Indictment and Proof Of Service			
12-20-48	Filed Motion Of Defendants Hunding Dairy Company, Western United Dairy Company and William Borusczek to Dismiss The Indictment			
12-20-48	Filed Motions of The Borden Company, H.H. Inglehart, O.N.Koenig and O.O. Smaha To Dismiss Indictment and Notice Of Filing and Proof Of Service			
12-20-48	Filed Brief Of Defendants In Support Of Motions To Dismiss The Indictment and 2 copies			
1-10-49	Filed Government's Brief in Opposition To Defendant's Motions to Dismiss The Indictment			
1-10-49	Filed 2 Proofs of Service d			
1-25-49	Fld addtl reply brf of Deft Meadowmoor Dairies, Inc.(5) brs.			
1-25-49	Filed Notice			
1-25-49	Filed 2 Reply Briefs of Defendants In Support Of Motions To Dismiss The Indictment			
1-25-49	Filed Notice Of Filing and Proof Of Service			
2-7-49	On Court's motion order hearing on defendants' motion to dismiss indictment contd to Feb 8, 1949 at 10:00 A.M. Barnes, J			
	Mailed notice 2-7-49 d			
2-8-49	On motion defts order hrg on defts' motion to dismiss indictment contd to Feb 14, 1949 at head of call - Barnes, J			
	Mailed notice 2-8-49 d			
2-11-49	On Court's motion order hrg on defts' motion to dismiss indictment contd from Feb 14, 1949 to Feb 15, 1949 at 10: A.M. - Barnes, J			
	Mailed notice 2-11-49 d			
2-21-49	Argts hrd and concluded Order deft's motion to dismiss indictment taken on argts and on briefs heretofore filed Barnes, J			
	Mailed notice 2-21-49 d			

D. C. 110

48 CR 350

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
2-24-49	Filed Transcript of Proceedings had before Judge Barnes 2-21-49			
3-15-49	Filed Request For Additional Briefs			
3-28-49	Fld defts' addtl memo. (6)hms			
4-6-49	Filed Memorandum of Judge Barnes			
4-13-49	Filed Notice and Proof of Service			
4-13-49	Order defts' motion to dismiss [illegible] over [illegible] Docket -Draft [illegible] J			
4-13-49	Filed Motion of Defendant [illegible] To Enlarge Time In Which To File Motions For Bills Of Particulars, Motions For Discovery and Inspection, and Other Preliminary Motions and For Continuance Of Arraignment And Trial Until Determination Of Said Motions -and Notice of Filing & Proof of Service- Bowman Dairy Co. et al			
4-13-49	Order defts given 60 days to file motions for bill of particulars etc. with [illegible] contd generally pending disp of said motions [illegible] -			
	Mailed [illegible]			
6-13-49	Filed Motion For Bill Of Particulars and Brief In Support Thereof, Motion To Strike Surplusage From The Indictment and Brief In Support Thereof, Motion For Discovery And Inspection In Accordance with Rule 16 Of The Federal Rules of Criminal Procedure and Brief In Support Thereof and Motion For A Subpoena In Accordance with Rule 17 (c) Of The Federal Rules Of Criminal Procedure and Brief in Support Thereof by American Processing And Sales Company			
6-13-49	Filed Motion Of Defendants Beloit Dairy Company and S.D. McGuire for Bill of Particulars, Motion To Strike Surplusage From The Indictment, Motion For Discovery And Inspection In Accordance Wit Rule 16 of the Federal Rules Of Criminal Procedure, Motion For A Subpoena In Accordance With Rule 17 (c) Of The Federal Rules Of Criminal Procedure and Proof Of Service			
6-13-49	Filed Briefs Covering all of the above motions			
6-13-49	Filed Motion Of The Borden Company And Certain Other Defendants For A Bill of Particulars, A Copy, Motion To Strike Surplusage From The Indictment A copy, Motion For			

CAUSE NO. 48 CR 360 RE:

DATE	PROCEEDINGS
6-13-49 contd	Discovery And Inspection In Accordance With Rule 16 Of The Federal Rules Of Criminal Procedure & copy, and Motion For A Subpoena In Accordance With Rule 17 (c) Of The Federal Rules Of Criminal Procedure & copy
6-13-49	Filed Briefs Of the Borden Company and Certain Other Defts covering the above motions
6-13-49	Filed Notice and Motions For A Bill of Particulars, To Strike Surplusage From The Indictment, For Discovery And Inspection and For a Subpoena Duces Tecum, with copies attached of Bowman Dairy Co, Walter F. Kettell, Francis H. Kullman Jr and D. Cameron Peck
6-13-49	Filed Briefs covering the above motions by Bowman Dairy Co and other defts.
6-13-49	Filed Motions For Bill of Particulars, To Strike Surplusage From The Indictment, For Discovery And Inspection and For Subpoena Duces Tecum of the Capitol Dairy Company and Hyman I. Fried
6-13-49	Filed Briefs of Capitol Dairy Co. and Hyman I. Fried in support of said motions
6-13-49	Filed Motions For Bill of Particulars, To Strike Surplusage From The Indictment, Motion For A Subpoena in accordance With Rule 16 and Motion For A Subpoena in accordance with Rule 17 (c) of Criminal Procedure of Hunding Dairy Company, Western United Dairy Company and William A. Boruszak
6-13-49	Filed Briefs of the above named defts in support of said motions
6-13-49	Filed Motions for Supplemental Bill Of Particulars, To Strike Surplusage From The Indictment, For Discovery and Inspection and For Subpoena in accordance with Rule 17 (c) by Meadowmoore Dairies Inc.
6-13-49	Filed Briefs in support of said motions
6-17-49	Filed Stipulation Extending Time For Filing Briefs
" " "	On stip ord time for Govt to file answering briefs in opposition to motions filed by defts extd to July 15, 1949 and time for defts to file reply extd to Aug. 15, 1949 Draft- Barnes, J
	Mailed notices 6-20-49
7-15-49	Filed brief of the Government in oppo to defts' several mots for bills of parts, discovery, subpoenas, and to strike surplusage. (2) (27) bms
~~7-22-49~~	~~Fld. Notc. & Prf. Serv. Govt's. Brf.~~ ERROR ~~(5)~~
7-22-49	Fld. Notc. & Prf. Serv. Govt's. Brf. (5) r
8-15-49	Fld. Note. & Mo. for Oral Argt. on Motions. (2)(1) r

D. C. 114

CAUSE NO 48 CR 360 RE:

DATE	PROCEEDINGS
8-15-49	Filed Memorandum Of Defendants In Reply To Govt's Brief In Opposition To Defendants' Several Motions For Discovery And Inspection Bill Of Particulars, Subpoena Under Rule 17 (c) And To Strike Surplusage
9-9-49	Order defts' motions for bill of particulars, etc., et for hrg on Sept. 26, 1949 Draft- Barnes, J
	Mld ntcs 9-9-49 d
9-23-49	On Court's motion order hrg on defts' motion for bill of particulars etc. contd from Sept. 26, 19 to Oct. 10, 19 9 at 10:00 A.M. Barnes, J
	Mld ntcs 9-23-49 d
10-6-49	On Court's motion ord hrg on defts' motions for bill of particulars etc contd from Oct 10, 19 to Oct 19 9 at 10: A.M. -Barnes, J
	Mld ntcs 10- -49 d
10-26-49	Filed Transcript of Proceedings before Judge Barnes
11-1-49	Filed Affidavit of Service of Subpoena d
11-2-49	Filed Stipulation
11-2-49	On stip ord defts' motions to settle ords in connection with defts' Motions in connection with defts' motions under Rule 16 and Rule 17 (c) set for hrg on Nov 7, 19 9 at 10:00 A.M. - Barnes, J
	Mld ntcs 11-2-49 d
11-3-49	Filed Affidavit Of Service Of Subpoena d
10-24-49	Argts hrd and concluded The Court decides defts' motions for discovery under Rule 16 and for a sub under Rule 17 C orally from the bench, and counsel directed to prepare and present within a short date and upon notice a draft order consistent with the views expressed. Order defts' motions to strike surplusage and for bill of particulars taken on brief and argmts - Barnes, J
11-7-49	Enter order directing Govt to perm t defts to inspect etc. certain documents etc Draft Enter order directing Govt to produce certain documents designated in a certain subpoena etc Draft - Barnes, J
	Mld ntcs 11-7-49 d
11-14-49	Filed Stipulation
11-14-49	Order on stipulation amending order of November 7, 1949 by changing return date in subpoena to November 28, 1949 Draft- Barnes, J
11-28-49	Filed Notice and Motion To Quash Subpoena and Proof Of Service
11-28-49	By agreement order further argmts and further briefs waived and Govt's motion to quash subpoena issued under Rule 17 (c) and to set aside order of May 7, 19 9 taken by the Court -Barnes, J
	Mld ntcs 11-28-49

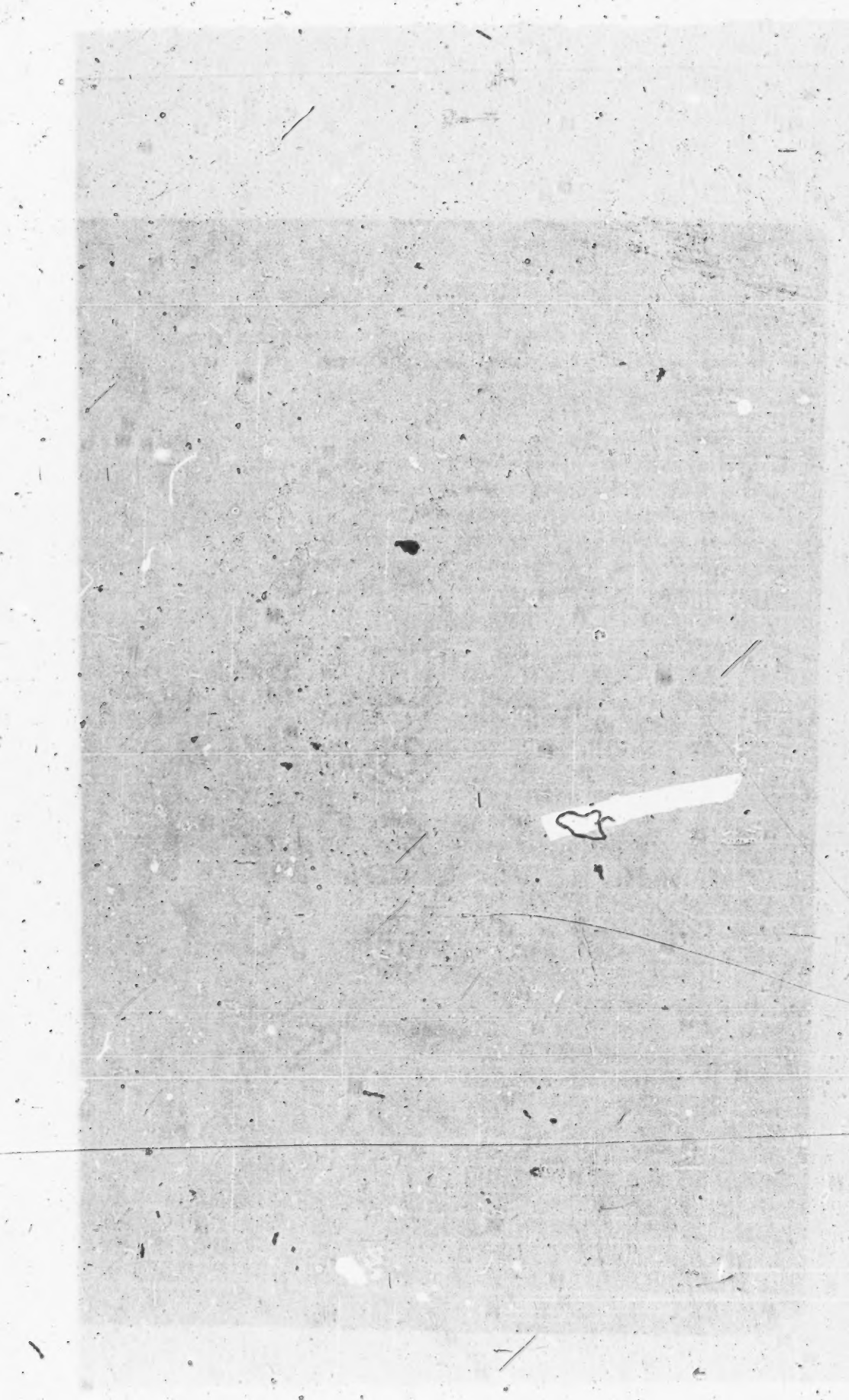
CIVIL DOCKET

DATE	PROCEEDINGS
12-[illegible]-49	Filed Transcript of Proceedings of [illegible] Nov. 7, 1949
[illegible]	Filed [illegible]
1-4-50	Ord several motions ... dtc to strike surplusage from indictment allowed exc Swaft
	Ord mot of Govt filed on Nov [illegible], 19[illegible] to quash [illegible] certain Subpoena Duces Tecum, denied Swaft
	Order several motions of defts for Bill of Particulars [illegible] granted in part and denied in part, etc Swaft-Barnes, J.
	Mld ntce 1-4-50
1-4-50	Filed Motion To Enter An Appropriate Order With Respect To The Refusal of Willis L. Hotchkiss, Special Asst To The Atty General, To Comply With A Subpoena Duces Tecum And With An Order Of This Court Entered Herein On Nov. 7, 1949 And Affidavit
1-4-50	Filed Statement Of Willis L. Hotchkiss, Special Asst to The Attorney General, Refusing To Comply With Order Of Nov. 7, 1949 and Subpoena
1-4-50	Ord deft's motion that Willis L. Hotchkiss, Special Asst to Atty General be held in contempt of Court entered. Hearing held and contd to Jan 5, 1950 at 10:00 A.M. for the entry of an order adjudging said Willis L. Hotchkiss in contempt of Court - Barnes, J.
1-5-50	Order Willis L. Hotchkiss Special Asst To The Atty General committed to the custody of the Atty General until said Willis L. Hotchkiss shall obey certain orders of this Court etc. Ord that Warshal to take said Willis L. Hotchkiss into custody. Entered - Barnes, J.
1-5-50	Filed Notice of Appeal
1-5-50	Issued certified copies of Order of 1/5/50 to Judge Barnes to Otto Kerner Jr
1-5-50	Filed certified copy of Order from U.S.C.A. signed by Judge J. Earl Major allowing deft to bail in amt of $1000. and releasing deft Hotchkiss on his own recognizance in amt of $1000.
	Mld ntce 1-5-50
1-10-50	Filed Transcript of Proceedings before Judge Barnes on Jan 4 and Jan 5, 1950

Form No. 110

48 CR 360

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
1-10-50	Issued commitment and copy for Hotchkiss to Marshal d			
1-13-50	Filed Appellant's Designation Of Contents Of Record On Appeal			
1-13-50	Filed Statement Of Points Relied Upon On Appeal and Proof of Service d			
1-20-50	Filed Designation Of Additional Portions Of Record, Proceedings and Evidence To Be Included On Appeal d			
2-2-50	Filed Stipulation Extending Time for Filing Bill of Particulars			
2-2-50	On stipulation ord time for Govt to file its Bill of particulars ext to March 3, 1950 - Draft - Barnes, J Mld ntcs 2-2-50			



203 United States of America,
Northern District of Illinois. } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Appellant's Designation and Appellees Additional Designation filed in this Court in the cause entitled: United States of America, Plaintiff, *vs.* Bowman Dairy Company, et al., Defendants, No. 48 Cr. 360, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 10th day of February, 1950.

Roy H. Johnson,
Clerk,
By Gizella Butcher,
Deputy Clerk.

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record filed April 19, 1950, in:

Cause No. 10080.

The United States of America,
Plaintiff,

vs.

Bowman Dairy Company, *et al.*,
Defendants,

and

Willis L. Hotchkiss.
Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 21st day of November, A. D. 1950.

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand, nine hundred and fifty, and of our Independence the one hundred seventy-fifth.

The United States of America, *Plaintiff*, 10080 *vs.* Bowman Dairy Company, *et al.*, *Defendants*, and Willis L. Hotchkiss, *Appellant*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

And afterward, to-wit, on the twentieth day of September, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, September 20, 1950.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

The United States of America, *Plaintiff*, 10080 *vs.* Bowman Dairy Company, *et al.*, *Defendants*, (Willis L. Hotchkiss, Appellant.)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of record and the briefs of counsel and on oral argument by Mr. L. Roger Wollenberg, counsel for appellant, and by Mr. L. Edward Hart, Jr., and Mr. Walter J. Cummings, Jr., counsel for the appellees, and the Court takes this matter under advisement.

And afterward, to-wit, on the seventh day of November, 1950, there was filed in the office of the Clerk of this Court the opinion of the Court, which opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10080 October Term and Session, 1950.

United States, *Plaintiffs,*
vs.
Bowman Dairy Company, *et al., Defendants,*
(Willis L. Hotchkiss, Appellant.)

Appeal from the U. S. District Court for the Northern District of Illinois, Eastern Division.

November 7, 1950.

Before MAJOR, *Chief Judge*, DUFFY and LINDLEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* The indictment herein charged eight corporations, all engaged in the milk business, and nine officers of such corporations with violation of Sec. 1 of the Sherman Act (15 U. S. C. A., Sec. 1), by conspiring to allocate, among such corporations, wholesale fluid milk customers in the Chicago area, and also to allocate the sales of fluid milk to certain public institutions located in said area.

The various defendants moved to dismiss the indictment, which motions were denied. Thereafter defendants moved for a bill of particulars, for discovery under Rule 16, and for a subpoena duces tecum under Rule 17(c), Federal rules of Criminal Procedure.[1] The government

1. Rule 16. *Discovery and inspection.* Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from

did not object to the motion under Rule 16, which requested an order directing the attorney for the government to produce for defendants' inspection the documents, books and papers which the government had obtained from the defendants and other persons by seizure or process. The motion under Rule 17(c), to which objection was made, was for an order requiring Willis L. Hotchkiss, special assistant to the Attorney General and chief of the midwest office of the Anti-Trust Division of the United States Department of Justice, to produce documents, books and papers obtained by the government by means other that seizure or process.

The district court entered an order directing the attorney for the government to produce for defendants' inspection, books, papers and documents designated in a subpoena duces tecum, which defendants had theretofore served and filed. The subpoena directed Mr. Hotchkiss to produce—

> "* * * all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial

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others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. *Subpoena.*

(a) *For attendance of witnesses; form; issuance.* A subpoena shall be issued by the clerk * * * and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. * * *

(c) *For production of documentary evidence and of objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."

The government's motions to quash the subpoena issued under Rule 17(c) and to set aside the order which directed compliance with the subpoena were denied. The grounds stated in the motion to quash were: (a) under Rule 17(c), Federal Rules of Criminal Procedure, a subpoena for the production of documents may not issue against an attorney for the government; (b) the court has no jurisdiction to order the attorney for the government to produce for inspection by the defendants the documents and other papers designated in a subpoena issued under Rule 17(c); and (c) the rights of defendants in criminal proceedings to obtain access to documents and other papers in the custody of attorneys for the government, as such term is defined in Rule 54(c) of the Federal Rules of Criminal Procedure, are limited to the rights granted to such defendants by Rule 16, Federal Rules of Criminal Procedure, and the application of such Rule 16 exhausts the rights of the defendants to secure access to such books, records and documents or other objects in the custody of an attorney for the government. Objection was also made that the subpoena called for the production of privileged documents, including among others documents which the government might have secured from confidential and voluntary informants and that the disclosure of such documents to defendants would be against public policy.

Hotchkiss submitted to the court a written statement in the form of an affidavit, which averred that all of the documents which the court had ordered produced were in his custody. After summarizing the reasons why he claimed the court did not have jurisdiction under Rule 17(c) to enter a pre-trial discovery order against an attorney for the government, he stated that, acting on the advice and instruction of the Attorney General of the United States and the Assistant Attorney General in charge of the Anti-Trust Division, he respectfully declined to comply with the court's order. The court then entered an order find-

ing Hotchkiss guilty of contempt of court and committed him to the custody of the Attorney General, to be held until such time as he complied with the provisions of the subpoena duces tecum, or until discharged from custody by due process of law. The matter before us is Hotchkiss' appeal from the order holding him in contempt of court.

It is readily apparent that Rule 16, Federal Rules of Criminal Procedure, is restricted in its scope. A defendant in a criminal case faces sharply defined limitations in securing access to documentary material in the hands of prosecuting attorneys of the federal government. The order granting access is directed to the attorney for the government. The only documents papers, books and objects to which a defendant can have access are those obtained from or belonging to the defendant or such as were obtained from others by seizure or process. Furthermore, the defendant must make a showing (a) that the items sought may be material to his defense, and (b) that the request is reasonable.

The history of the development of Rule 16 shows that the limitations appearing therein were deliberately inserted. In May, 1943, the Advisory Committee in charge of formulating the new criminal rules released to the bench and bar of the country, for consideration and suggestion, the preliminary draft of such rules. The first predecessor to Rule 16 (Rule 19) provided broadly for discovery and inspection in this language:

> "* * * the court may order the attorney for the government to permit the inspection * * * of any designated * * * documents, * * * not privileged, * * *."

As proposed this rule was substantially identical to Rule 34 of the Federal Rules of Civil Procedure then in effect, which provided for inspecting, copying and photographing "of any designated documents, papers, books, * * * not privileged." To many members of the bench and bar who had assumed the law to be that the right of discovery was not recognized in criminal cases, the proposed rule was undoubtedly a startling innovation. See: *Shores v. United States*, 8 Cir., 174 F. 2d 838, 844. It had been stated as a recognized rule of law that at common law a defendant had no right of discovery in criminal cases. Wigmore, Evidence (3d Ed.), Sec. 1859g. In the second

preliminary draft, issued by the Advisory Committee in February 1944, the provision in the proposed rule on discovery and inspection (which in that draft was Rule 18) was narrowed to:

> "* * * designated books, * * * obtained from or belonging to the defendant or constituting evidence in the proceeding, * * *."

The finally approved rule clearly reveals the standards set in the civil discovery rule (No. 34) were rejected in favor of an entirely new standard. In the Advisory Committee's Notes to Rule 16, all reference to civil rules was omitted, and the limited nature of the provision for discovery in criminal proceedings is emphasized. The note reads:

> "Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States* v. *Rosenfeld*, 57 F. 2d 74 (CCA-2)—cert. den., 286 U.S. 556. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States* v. *B. Goedde and Co.*, 40 F. Supp. 523, 534 (E.D. Ill.). The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court."

Considering the history of Rule 16 which shows the evolution from the broad terms of its first draft to its final restrictive and limited terms, it is difficult to believe that the framers of the rule intended to authorize discovery and inspection of broad scope under Rule 17(c) pertaining to subpoena which was expressly prohibited by Rule 16 which is the rule intended to cover discovery and inspection. It does not make sense to have created in one rule a privilege of discovery limited to documents and papers belonging to the defendant or taken from others by seizure or process and at the same time to create in Rule 17(c) an almost unlimited right of discovery by use of the subpoena provisions.

In *United States* v. *Maryland & Virginia Milk Pro-*

ducers Assn., Inc., et al., 9 F.R.D. 509, the defendants endeavored to obtain a subpoena duces tecum which required the government to produce all documents which it had obtained from any person not a party to the proceeding, whether by process or not. Judge Holtzoff denied the request and it is of significance that Judge Holtzoff was a member of the Advisory Committee which drafted the criminal rules. Judge Holtzoff stated (p. 510):

> "The purpose of this provision is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial. It is not intended as a discovery provision.
>
> "In this case the proposed subpoena duces tecum is not intended to be used to secure evidence to be introduced at the trial, but is intended to be employed as a broad discovery for the purposes of inspecting all the documentary evidence in possession of the Government and which the Government intends to use at the trial.
>
> "It is well settled that in a criminal case, unlike a civil action, such a right of broad discovery does not exist. As I said before, Rule 17(c) was not intended to be a discovery provision, but merely a means to make a subpoena duces tecum returnable prior to the trial in order that time at the trial may be saved while documents are being examined and inspected."

In *United States v. Brunfield et al.*, 85 F. Supp. 696 which was a conspiracy case, the defendant sought, under Rules 16 and 17, to have produced a voluntary statement of a co-defendant. The court said (p. 707) that Rule 17(c) "is simply complementary to Rule 16 in providing for subpoena addressed to the party having possession of the documents, to produce them." It was the holding of the court that since the document had not been obtained by seizure or process, it was beyond the reach of subpoena issued under Rule 17(c). The court did indicate that if the co-defendant were a witness at the trial, the statement might be used for impeachment purposes.

In *United States* v. *Hiss*, 9 F. R. D. 515, the defendant endeavored to obtain papers from the Commissioner of Immigration and Naturalization. The court said (p. 516):

> "To permit the subpoena and the ex parte order to

> stand would, it seems to the Court, set a precedent whereby defendants could promiscuously seek subpoenas under Rule 17(c) of the Federal Rules of Criminal Procedure * * * which the Clerk issues without question * * *."

The only case called to our attention holding to the contrary is *United States* v. *Bondy*, 171 F. 2d 642, a per curiam decision. The court there said (p. 644):

> "* * * So much of the order as directs production of the documents designated in the subpoena is authorized by Rule 17(c). * * *"

The real holding in that case was that the Court of Appeals lacked jurisdiction to entertain the mandamus petition. In spite of the language used the opinion cannot be construed as a considered determination as to the character of documents which a subpoena may include or the purposes for which it may issue.

Although the language of Rule 17(c) is broad, the rule is only one in an integrated group for the regulation of procedure in criminal cases in federal courts. It must be read with the other rules in mind, and particularly Rule 16. It should not be construed so that the carefully drawn limitations in Rule 16 become meaningless. It is our view that Rule 17(c) provides for the traditional type of trial subpoena, although as a matter of convenience it may be made returnable before the actual date of trial. However, it may not be converted into an unrestricted pre-trial discovery device.

The government's motion to quash the subpoena and to set aside the order which directed compliance therewith should have been granted. The order adjudging Willis L. Hotchkiss to be in contempt must be and hereby is

REVERSED.

MAJOR, *C. J.*, concurring. I agree with the result reached by Judge Duffy and with his reasoning, but I would go further and hold that Rule 17(c) imposes no obligation upon parties, either the defendants or the government, including their attorneys.[1] In my view, the rule is so plain and unambiguous as to leave little if any need for construc-

1. I would so hold notwithstanding what I regard as the ill-conceived admission made by counsel for the government on oral argument that the rule might apply to the government in some instances.

tion. More than that, I am unwilling to impute to the rule makers and those associated therewith, including Congress and the Supreme Court, such carelessness and indifference as is inherent in defendants' position and the argument made in its support.

In order to avoid repetition, I accept what appears to be an accurate statement of the facts as made by Judge Duffy. And I am not too much concerned with the cited authorities because they are so meager and uncertain as to furnish little if any light. In reality, the question posed is one of first impression. The pertinent and controlling language of 17(c) is the first sentence, "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein." Two words contained in this sentence, "also" and "person", are significant and I think determinative. The dictionary definition of the word "also" is, "As something further; tending in the same direction; besides; as well; in addition." (Funk and Wagnalls New Standard Dictionary of the English Language.) The word as thus defined is no different than its common, every-day meaning. The word presupposes that a previous command has been made upon the person who is directed to produce. What is this previous demand and who is the person to whom it is directed? The answer is found in 17(a), "A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed and otherwise in blank to a party requesting it, who shall fill in the blanks before it is served." Thus it is plain that under (a) a person to whom the subpoena is directed is required "to attend and give testimony," and under (c) such person may also be commanded "to produce the books, papers, documents or other objects designated therein." As Judge Duffy suggests, this is the traditional trial subpoena, and it is directed at a person in one instance to "attend and give testimony," and in the other to "also" produce the designated documents.

Evidently "person" refers to one subpoenaed as a witness and not to a party or an attorney. The theory of a party to a suit directing a subpoena to the opposite party or to an attorney is a novelty to me. The government in a criminal case and the plaintiff in a civil suit are in court

of their own volition, and the defendants in a criminal case are in court by virtue of a warrant (sometimes a summons) and in a civil suit by summons. When thus in court they are at all times subject to its orders and command, and the same is likewise true of the attorneys of record for the respective parties, and it is an anomaly to think of a party requiring an opposing party or its attorney to do something at the command of a subpoena.

Rule 17 is entitled "Subpoena," and every paragraph from (a) to (g) inclusive demonstrates that it is directed at witnesses and not to parties. Paragraphs (a) and (c) may be utilized by the parties on both sides alike and either provision is brought into operation without motion and without a court order. The sole requirement is that the clerk issue a subpoena in blank under the seal of the court to a "party requesting it," which party is required to fill in the blank by inserting the name of the person to be subpoenaed as a witness and to designate the documents which such person is required to produce. 17(b) is for the benefit of "Indigent Defendants," and provides a procedure for obtaining the attendance of witnesses without cost. Such defendant is required to "state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed." 17(d) provides for the service of a subpoena "by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law." Is it conceivable that the "person named" has reference to a party or an attorney entitled to a fee for court attendance and for mileage? 17(e) provides that a subpoena requiring the attendance "of a witness at a hearing or trial" may be served any place within the United States, and a subpoena directed to a witness in a foreign country shall be issued and served as provided by statute.

A study of the Rules of Criminal Procedure is convincing that the rule makers carefully differentiated between such words and phrases as "government" or "attorney for the government" or "defendant" or "party" or "person." The rules state with precision as to when and to whom they are applicable. Illustrative is Rule 16, entitled "Discovery and Inspection." Judge Duffy has discussed this rule and the notes of the advisory committee. I need not add to what he has shown, except to emphasize that the rule is for the benefit of a defend-

ant and can only be brought into operation by an order of court upon motion of the defendant. It is specifically directed at the "attorney for the government." And is there any reason to think that if Rule 17 is for the benefit of the defendant and is directed at "the attorney for the government," as the defendants here contend, that the rule makers would not have expressly so stated as was done in Rule 16? It borders on the absurd to argue for a construction of Rule 17(c) which would confer on a defendant an unlimited right of production by the government when such right has been definitely limited in Rule 16 by exact and specific language.

That the word "person" when used in a statute does not include the sovereign unless it is clear from the context, legislative history and background of the statute that such effect was intended, has been held by the Supreme Court. *United States* v. *Cooper Corporation*, 312 U. S. 600; *United States* v. *United Mine Workers of America*, 330 U. S. 258. In so holding, the court in the *Cooper* case stated (page 604): "Since, in common usage, the term 'person' does not include the sovereign statutes employing the phrase are ordinarily construed to exclude it," and the court further stated (page 606): "Without going beyond the words of the section, the use of the phrase 'any person' is insufficient to authorize an action by the Government. This conclusion is supported by the fact that if the purpose was to include the United States, 'the ordinary dignities of speech would have led' to its mention by name * * *." In the *United Mine Workers of America* case, the court stated (page 275): "The Act [Norris-LaGuardia] does not define 'persons.' In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. Congress made express provisions, R. S. § 1, 1 U. S. C. § 1, for the term to extend to partnerships and corporations, and in § 13 of the Act itself [Norris-LaGuardia] for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them."

Defendants' construction of Rule 17 not only brings it in irreconcilable conflict with Rule 16 but strips the latter of all meaning. If such construction be accepted, I perceive no reason why a defendant would ever proceed under Rule 16. Why bother to go into court and

obtain an order directing the government to make the limited production required under Rule 16 when much more could be obtained merely by filling in the blank space of a subpoena as provided for in Rule 17?

Defendants argue that "the authority granted by the terms of Rule 17(c) is discretionary." This is not correct as to the issuance of the subpoena which, as I have already shown, issues without motion and without order of court. The court has nothing to do with the subpoena until it has been issued and served. It is only subsequently thereto that the court is given any discretion, and the only novel feature contained in the provision, which I am able to detect, is the discretion lodged in the court to direct that the documents called for in the subpoena be produced before the court, prior to trial or prior to the time they are to be offered in evidence, and the discretion to permit the documents produced "to be inspected by the parties and their attorneys." Defendants, grasping at straws, profess to discern something in these last quoted words which fortifies their theory, but to my mind such words, if they have any significance, point in the opposite direction. Again, these words show how carefully the words "parties and their attorneys" were distinguished from the word "person."

Thus, as I read Rules 16 and 17, there is no conflict. Each is designed to serve a separate and distinct purpose. Rule 16 confers a limited privilege upon a defendant and to a like extent imposes an obligation upon "the attorney for the government." Rule 17 enables either party to obtain the attendance of a witness for the purpose of giving testimony, which witness may "also" be required to produce documents. In the latter event, the court may order such documents produced prior to trial and may permit their inspection by "the parties and their attorneys."

It is, therefore, my conclusion that the word "person", as used in Rule 17, does not include and is not applicable to the parties or their attorneys and that it provides for no command which may properly be directed to them. So there may be no mistake, I desire to emphasize that what I have said relates solely to the rule in controversy and has no reference to other means which may be employed to obtain the production of documentary evidence.

LINDLEY, *C. J.* dissenting:

I am sorry that I can not agree with the majority. It seems to be that my brethren read Rule 17(c) out of the books,—completely delete it. Rule 16 provides for the production of certain documents. Rule 17(c) authorizes a subpoena duces tecum,—an age-old expedient for securing the production of documents at the trial. However, it adds an innovation, in that the documents subpoenaed may be ordered produced prior to trial, for inspection. If we ignore this plain provision, then defendants may have only the documents mentioned in Rule 16; they may not have access to the additional documents authorized by 17(c); they are thereby completely prevented from employing the means provided by 17(c). Such a conclusion, it seems to me, does violence to the plain language of the rule.

That the documents subpoenaed were in the possession of the person to whom the subpoena was addressed is, as pointed out by Judge Duffy, admitted. Whether they were material or relevant was a question for the court. Why should the fact that the person who has the documents happens to be an attorney destroy the rule? I know of no principle of law that exempts from service and enforcement of a subpoena or from giving testimony one who has documents merely because he is an attorney in the case, whether for the complaining party or the defending party. Could the defendants successfully object to a similar subpoena served upon one of their counsel, commanding him to produce documents in his possession for inspection, as the rule provides, simply because it is addressed to one who is counsel in the case? I think not.

I agree with Judge Major that there is no conflict between the two rules and that each is "designed to serve a separate and distinct purpose." But I must part company with him when he concludes that we must absolve the government from compliance with a rule general in terms and applicable to any person merely because the person named in the subpoena happens to be a lawyer for the government.

I recognize that the extent of the relief to be granted under Rule 17(c) lies wholly within the discretion of the trial court, and were it appellant's contention that the District Court abused its discretion, we might have something to talk about. But no such question has been raised either in the trial court or here.

And on the same day, to-wit, on the seventh day of November, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, November 7, 1950.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

The United States of America, *Plaintiff*, vs. Bowman Dairy Company, *et al.* *Defendants*, and Willis L. Hotchkiss, *Appellant*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

10080

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed.

And afterward, to-wit, on the fourteenth day of November, 1950, there was filed in the office of the Clerk of this Court a designation of record which said designation is in the words and figures following, to-wit:—

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10080.

United States of America, *Plaintiff,* *vs.* Bowman Dairy Company, *et al.*, *Defendants,* and Willis L. Hotchkiss, *Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable John P. Barnes, Trial Judge.

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED.

Bowman Dairy Company, et al., defendants-appellees in this cause, designate the following portions of the record in this Court to be printed:

1. The Order of this Court taking the cause under advisement.
2. The Opinion of this Court.
3. The Judgment of this Court.
4. The Order of this Court staying the issuance of its mandate.
5. This Designation.

L. Edward Hart, Jr.,
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Charles L. Stewart, Jr.,
Charles F. Simon,
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Herman A. Fischer,
Carlton L. Fischer,
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Isidore Fried,
Herbert B. Fried,
Attorneys for Capitol Dairy Company and Hyman I. Freed.

Leo F. Tierney,
Charles L. Stewart, Jr.,
Attorneys for Beloit Dairy Company and S. D. McGuire.

Thomas B. Gilmore,
Attorney for Hunding Dairy Company, Western United Dairy Company and William R. Boruszak.

Charles W. Schaub,
Attorney for Meadowmoor Dairies, Inc.

Of Counsel:
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Isidore and Herbert B. Fried,
Mayer, Meyer, Austrian & Platt,
Montgomery, Hart, Pritchard & Herriott,
Schumacher, Gilmore & Van Ness,
Sidley, Austin, Burgess & Smith.

Received a copy of the foregoing Designation this 14th day of November, A. D. 1950.

Willis L. Hotchkiss,
Chief of the Midwest Office and Trial Attorney, Antitrust Division, Department of Justice (Appellant).

Endorsed: Filed November 14, 1950. Kenneth J. Carrick, Clerk.

And afterward, to-wit, on the sixteenth day of November, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, November 16, 1950.

Before:

Hon. F. Ryan Duffy, Circuit Judge.

The United States of America, *Plaintiff,* 10080 *vs.* Bowman Dairy Company, *et al.*, *Defendants,* and Willis L. Hotchkiss, *Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On motion of counsel for the defendants-appellees, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed pursuant to Rule 25 of the Rules of this Court.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and the proceedings had, made in accordance with the designation of record filed on November 14, 1950, in:

Cause No. 10080.

The United States of America,

Plaintiff,

vs.

Bowman Dairy Company, *et al.*,

Defendants,

and

Willis L. Hotchkiss,

Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 21st day of November, A. D. 1950.

Kenneth J. Carrick,

(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

FILE COPY

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 435

BOWMAN DAIRY COMPANY, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND
WILLIS L. HOTCHKISS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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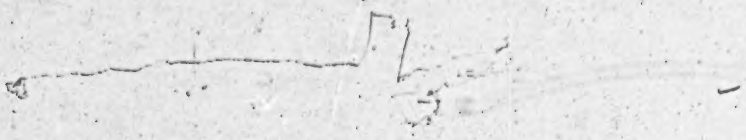
MONTGOMERY, HART, PRITCHARD & HERRIOTT,
SCHUMACHER, GILMORE & VAN NESS,
SIDLEY, AUSTIN, BURGESS & SMITH.

December, 1950.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

BOWMAN DAIRY COMPANY, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND
WILLIS L. HOTCHKISS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on November 7, 1950.

OPINIONS BELOW.

Neither the opinion of Judge Duffy (R. 128-134), nor the concurring opinion of Judge Major (R. 134-138), nor the dissenting opinion of Judge Lindley (R. 139), has been officially reported.

JURISDICTION.

The judgment of the court of appeals was entered on November 7, 1950 (R. 140). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1) and Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

Pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, the district court ordered the respondent Hotchkiss, an attorney for the Government, to permit the petitioners and their attorneys to inspect certain documents in the possession of respondent Hotchkiss. For refusal to comply with this order, respondent Hotchkiss was adjudged in contempt of court. The court of appeals reversed.

The following questions are presented:

I. Whether a defendant in a criminal case may never inspect, in advance of trial, documents obtained by the Government by means other than seizure or process.

II. Whether the discretionary provisions of Rule 17(c) of the Federal Rules of Criminal Procedure empower a district court to order Government counsel to produce documents for pre-trial inspection by defendants and their attorneys.

III. Whether orders directing compliance with pre-trial subpoenas *duces tecum* may properly be directed to attorneys for the Government, or only to persons other than parties or their attorneys.

IV. Whether the Federal Rules of Criminal Pro-

cedure confirm the power of a district court to expedite litigation and promote its orderly handling by requiring both parties to make documents available in advance of trial.

RULES INVOLVED.

Rule 17(c) of the Federal Rules of Criminal Procedure provides as follows:

> "For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

Rule 16 provides as follows:

> "Discovery and Inspection. Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

Rule 2 provides as follows:

> "Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

STATEMENT.

The indictment in this case charges eight corporations and nine corporate officers with a criminal conspiracy to violate Section 1 of the Sherman Act (R. 3-9).[1] Motions by the petitioners, defendants below, to dismiss the indictment were based in part upon the vagueness and indefiniteness of the charge therein laid. These motions were denied on April 13, 1949 (R. 117). Thereafter, on June 13, 1949, each petitioner sought to ascertain the specific facts upon which the indictment was based and the full nature and cause of the accusation by filing three motions[2] (R. 117):

1. A motion under Rule 17(c) of the Federal Rules of Criminal Procedure for a subpoena *duces tecum* requiring the Government to produce for petitioners' inspection certain documents obtained by the Government by means other than seizure or process (R. 10-27);

2. A motion under Rule 16 for an order directing the Government to produce for inspection certain other documents which the Government had obtained by seizure or by process (R. 28-46);

1. The indictment was returned on July 30, 1948, by a grand jury sitting in the Northern District of Illinois, Eastern Division (R. 2).

2. The petitioners also filed a motion to strike surplusage from the indictment (R. 117); this motion was granted (R. 75).

3. A motion for a bill of particulars (R. 117).

The district court granted parts of the first two motions and denied the motion for a bill of particulars except in two minor respects (R. 64, 69-70, 75).

The motion for a subpoena under Rule 17(c) was served on Government counsel and presented to the district court before the subpoena was issued (R. 117, 48-49). At a full hearing on October 24, 1949 (R. 119), with Government counsel participating, the court directed the defendants to limit the scope of the proposed subpoena (see parenthetical exceptions and limiting clauses set off by (a), (b) and (a), (b) and (c) in quotation from subpoena, *infra*, pp. 5-6). The motion for a subpoena was then granted orally from the Bench on that day (R. 119). The subpoena *duces tecum* was addressed to respondent Willis L. Hotchkiss, Special Assistant to the Attorney General, and was served on November 1, 1949 (R. 48-50). On November 7, 1949, after a hearing to settle the order to comply with the subpoena (R. 51-63), the district court entered an order (R. 69-71) directing respondent Hotchkiss, pursuant to Rule 17(c), to produce for petitioners' inspection the books, papers and documents designated in the subpoena. A copy of the subpoena was attached to the district court's order. It directed production of (R. 71):

> "* * * all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury;

or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."

The Government subsequently moved to quash the subpoena issued under Rule 17(c), and to set aside the order of November 7, 1949, which directed compliance with this subpoena (R. 72-73). The grounds for the motion were: (a) that under Rule 17(c) of the Federal Rules of Criminal Procedure, a subpoena for the production of documents may not issue against an attorney for the Government; (b) that the district court had no jurisdiction to order the attorneys for the Government to produce, for inspection by defendants, documents and other papers designated in a subpoena issued under Rule 17(c); and (c) that the right of defendants in criminal proceedings to obtain access to documents and other papers in the custody of an "Attorney for the Government", as defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted by Rule 16 of said Rules (R. 72-73). The Government did not challenge the form or the timeliness of the subpoena (R. 61, 62, 72-73, 74, 103-104).

On January 4, 1950, the district court denied the Government's motion to quash (R. 83-84). Respondent Hotchkiss thereupon submitted to the district court an affidavit, which averred that all of the documents which the district court had ordered produced were in his custody (R. 84-85). The statement summarized asserted reasons why the district court had no jurisdiction under Rule 17(c) to enter a pre-trial inspection order against an attorney for the Government, and set forth that the respondent Hotchkiss, acting on the advice and instructions of the Attorney General of the United States and the Assistant Attorney

General in charge of the Antitrust Division, respectfully declined to comply with the district court's order of November 7, 1949 (R. 86-87). Although this statement contended that some of the documents were privileged (R. 85), this point was not argued in the district court and was not briefed or argued in the court below.[3]

On January 5, 1950, the district court entered an order finding respondent Hotchkiss guilty of contempt for refusing to produce the documents designated in the subpoena *duces tecum*, and for refusing to comply with the court's order of November 7, 1949. While the court did not impose any other penalties on the respondent Hotchkiss, the order committed him to the custody of the Attorney General until he should comply with the provisions of the subpoena *duces tecum* and should obey the district court's order of November 7, 1949, or until he should be discharged from custody by due process of law (R. 99). On the same day, respondent Hotchkiss took an appeal from the order holding him in contempt of court (R. 100) and, by an order of the Court of Appeals for the Seventh Circuit, he was admitted to bail on his own recognizance until further order of that court (R. 102).

On November 7, 1950, the court of appeals filed its opinions, and entered a judgment reversing the order of the district court. Each of the three judges of the court of appeals filed a separate opinion. Judge Duffy rendered the first opinion, Chief Judge Major rendered a concurring opinion, and Judge Lindley rendered a dissenting opinion. (R. 128-140.) The opinion of Judge Duffy interpreted Rule 17(c) in the light of the legislative history of Rule 16 and in the light of the early English common law; he concluded that Rule 17(c) was not in-

3. In these proceedings, the Government has never relied on Department of Justice Order No. 3229 and Supplement No. 2 thereto which are involved in *United States* ex rel. *Roger Touhy* v. *Ragen and McSwain*, No. 83, present Term, recently argued here.

tended to authorize the inspection of documents obtained by the Government by means other than seizure or process, on the ground that the inspection of such documents was "expressly prohibited by Rule 16". Judge Duffy held that Rule 17(c) provides only "for the traditional trial subpoena, although as a matter of convenience it may be made returnable before the actual date of trial." (R. 128-134.)

Chief Judge Major's opinion took the position that the Government and its attorneys were excluded from the scope of Rule 17(c), in view of the word "person" therein, and that Rule 17(c) applies merely to witnesses who are not parties or attorneys (R. 134-138).

In his dissenting opinion, Judge Lindley pointed out that the majority opinion "read Rule 17(c) out of the books—completely delete[d] it". He stated that the majority opinion "does violence to the plain language of" Rule 17(c). Judge Lindley was of the opinion that under Rule 17(c), the extent of relief to be granted thereunder was placed "within the discretion of the trial court." (R. 139.)

REASONS FOR GRANTING THE WRIT.

The resolution of the questions presented has great significance quite apart from the facts and parties here involved, in that the decision of the court of appeals calls into question "the spirit that is intended to motivate the application of all the sixty Rules promulgated by the Supreme Court" and fails to make it "clear that they are not in any case to be interpreted technically so as to defeat the ends of justice".[4] It presents a conflict with the only other decision of another court of appeals on the same matter. *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2). No question of abuse of discretion was presented in either the *Bondy* case or this case (R. 139). The decisions of several district courts are in hopeless conflict as well. The conflict is epitomized by the three opinions of the Court of Appeals for the Seventh Circuit in the instant case. The decision of the court below in effect forecloses the use of sound judicial discretion by a trial court under the Federal Rules of Criminal Procedure to bring about a "just determination of every criminal proceeding [and] * * * to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay".[5]

4. Chief Justice Vanderbilt, Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), p. 121; see also p. 120.

5. Rule 2, Federal Rules of Criminal Procedure, p. 4, *supra*.

I.

The court of appeals held that the district court was without jurisdiction to order an attorney for the Government to produce before trial, for inspection by petitioners, any evidence which would not have been subject to a motion for discovery and inspection under Rule 16.

The Court of Appeals for the Second Circuit, in *United States* v. *Bondy*, 171 F. 2d 642, reached exactly the opposite conclusion. District Judge Bondy had ordered the Government in the proceeding of *United States* v. *Littell and Marks* (Case No. C127-420, S. D. N. Y.) to produce documents subpoenaed under Rule 17(c) (including documents not obtained from or belonging to defendants and not obtained from others by seizure or process) although the same documents could not have been included in a discovery order under Rule 16. The Government sought a writ of mandamus from the court of appeals to direct Judge Bondy to vacate the order. As in the instant case, the Government argued that Rule 17(c) granted the trial judge no authority to require pre-trial production of the documents subpoenaed. The Court held (171 F. 2d at p. 644):

> "So much of the order [of the District Court] as directs production of the documents designated in the subpoena is authorized by Rule 17(c). The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the court's jurisdiction."[6]

One Circuit thus holds that it is beyond a district court's jurisdiction to permit pre-trial inspection of documents under Rule 17(c), when the same evidence could not be inspected pursuant to Rule 16. The other Circuit holds that to make such use of Rule 17(c) is within the district court's jurisdiction and discretion. A direct conflict therefore

6. The question whether the district court abused its discretion in the instant case was not raised in the court below (R. 139).

exists. The importance of the matter in conflict is considerable, as will appear from the further reasons developed below.

District courts also differ widely in their interpretations of Rule 17(c) and in their views as to its relation to Rule 16. District courts, in Illinois and New York, have permitted subpoenas *duces tecum* in this and similar cases,[7] while district courts in the District of Columbia, Louisiana and New York have declined to permit similar use of Rule 17(c).[8] While each case differs from the others in one or more material facts, the views of the respective judges still cannot be reconciled. As was true in *Hickman* v. *Taylor*, 329 U. S. 495, 500, this case presents a "problem which has engendered a great divergence of views among district courts," and certiorari should therefore be granted.

II.

The impact of the decision below is not limited to the determination of how a procedural enactment should be interpreted and applied, although that effect is far-reaching. The decision below denies to defendants in criminal cases certain basic privileges which are deeply rooted in the

7. Pre-trial inspection subpoenas have been granted against the Government under Rule 17(c) in *United States* v. *Hiss*, Case No. C128-402, (S. D. N. Y., unreported opinion of November 10, 1949); *United States* v. *Littell and Marks*, Case No. C127-420 (S. D. N. Y., orders of October 30, 1948 and May 16, 1949); and the instant case (R. 69-70). In *State* v. *Bunk*, 63 Atl. 2d 842 (Cy. Ct. N. J., 1949) Rule 2:5-8(c) of the New Jersey Rules of Criminal Practice, which is identical with Rule 17(c), was construed as authorizing pre-trial inspection by defendants of records of a state reformatory and a state penitentiary, and of a murder weapon. The narrative statements which were withheld from examination were comparable to those excluded from the subpoena in the instant case (see material in parentheses in second sentence of subpoena; p. 5, *supra*, and R. 71).

8. *United States* v. *Maryland & Virginia Milk Producers Association*, 9 F. R. D. 509 (D. D. C.); *United States* v. *Brumfield*, 85 F. Supp. 696 (W. D. La.); *United States* v. *Hiss*, 9 F. R. D. 515 (S. D. N. Y.).

American common law and which, as Chief Justice Marshall pointed out in *United States* v. *Burr*, 25 Fed. Cas., Case No. 14692d at p. 33, are afforded to an accused person by necessary implication from the Sixth Amendment's guarantee of his right "to have compulsory process for obtaining witnesses in his favor."

The majority opinion below holds that any form of pre-trial inspection by defendants of documentary evidence in the possession of the prosecution was a "startling innovation" (R. 131).[9] In stating that no *right* of inspection was recognized at common law, the opinion below may have been correct, but in holding that the district court had no discretion to grant a *privilege* of inspection except as permitted by Rule 16, the court made, we submit, a fundamental error.

Even before adoption of the United States Constitution, courts of the American states had departed from the concept of royal prerogative which, in the British common law, had barred defendants' access to the Crown's evidence until the moment such evidence was introduced during the trial. Those early decisions of the State courts were rec-

9. The opinion relied (R. 131) on a statement by Professor Wigmore that "At common law no right of inspection of documents before trial was conceded to the accused" (6 Wigmore on Evidence (3rd ed., 1940) §1859*g*). Petitioners do not urge that they have a right of inspection under Rule 17(c) but merely a privilege of inspection when, as here, the district court adjudges such an inspection to be warranted. Moreover, Wigmore's statement was evidently referring to the early English common law, which has been modified (see Note 11, *infra*), for he relied solely on *Rex* v. *Holland*, 4 T. R. 690, 100 Eng. Rep. 1248 (1792) and *Commonwealth* v. *Jordan*, 207 Mass. 259 (1911). The latter case held that it was within the discretion of the trial court to grant or refuse a motion to furnish the defendant, accused of murder, with a report of the autopsy on the victim (207 Mass. at pp. 264-265). Wigmore states that "considerations of fairness * * * call also for conceding the opportunity of inspection of documents" by an accused; he is highly critical of the early English rule (*ibid.*; see also *op. cit.* §§ 1850, 1859, 1863; 2 Bishop, *New Criminal Procedure* (2d ed., 1913) pp. 771-772).

ognized by Chief Justice Marshall during the trial of Aaron Burr (see 25 Fed. Cas. at p. 34) when he honored defendant Burr's right to subpoena from the President of the United States, for pretrial inspection, certain letters deemed by Burr to be essential to his defense. At the recent trial of Alger Hiss a district judge also granted a subpoena *duces tecum* for pretrial inspection of documents in possession of the Government.[10] In neither case would the evidence in question have come within the limits of Rule 16. While the issue here arises under Rule 17(c) of the Federal Rules of Criminal Procedure, it involves the same basic principles of constitutional law which were applied in the cases of the early American period.

In the interim, there have been innumerable occasions when trial courts in criminal cases have felt that justice required them to permit defendants to have access before or during the trial to evidence which the prosecutor attempted to withhold. During this long period, the means employed by defendants who sought to examine evidence in such circumstances have included subpoenas *duces tecum* directed to whatever officer of the Government had possession or custody of the evidence in question. *United States* v. *Burr*, 25 Fed. Cas. No. 14,692d at pp. 34-35, 37, 38; *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2); cf. *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523, 534 (E. D. Ill.); *United States* v. *Warren*, 53 F. Supp. 435, 436 (D. Conn.); *People* v. *Geroid*, 265 Ill. 448, 469-471 (1914).[11]

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10. *United States* v. *Hiss*, Case No. C128-402 (S. D. N. Y.), unreported opinion of November 10, 1949.

11. See also discussion in *Shores* v. *United States*, 174 F. 2nd 838, 844-845 (C. A. 8); see *United States* v. *Rich*, 6 Alaska 670 (1922);

It would appear that the accused's common law privilege of inspecting documentary evidence before trial in appropriate cases, whether or not the evidence has been obtained by the prosecuting authorities by seizure or process, would be completely abrogated by the narrow construction of Rule 17(c) adopted by the majority of the court below.

The American common law cases permitting inspection were sometimes complementary to the indictment and bill of particulars. In this case, the district court had previously denied petitioners' motions to dismiss the indictment (R. 117). In addition, except to a very limited extent, the court had denied the defendants' motions for a bill of particulars at the very time that it denied the Government's motion to quash this subpoena (R. 75). Thus,

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State v. *Superior Court*, 39 Ariz. 242, 249-250 (1931); *Daly* v. *Dimock*, 55 Conn. 579 (1827); *People* v. *Buzan*, 351 Ill. 610, 618 (1933); *Padgett* v. *State*, 64 Fla. 389, 395-396 (1912); *State* v. *Burris*, 198 Ia. 1156, 1162 (1924); *State* v. *Howland*, 100 Kan. 181, 185 (1917); *State* v. *Hinkley*, 81 Kan. 838, 846-848 (1910); *State* v. *Dorsey*, 207 La. 928, 964-966 (1945); *State* v. *Lowery*, 160 La. 811 (1926); *State* v. *Murphy*, 154 La. 190, 203 (1926); *State* v. *Bramhall*, 134 La. 1 (1913); *State* v. *Haas*, 188 Md. 63, 70-76 (1947); *Commonwealth* v. *Jordan*, 207 Mass. 259, 264-265 (1911); *Spinkle* v. *State*, 137 Miss. 731, 732-733 (1925); *State* v. *Tippett*, 317 Mo. 319, 326-327 (1927); *Cramer* v. *State*, 145 Neb. 88, 94-96 (1944); *People* v. *Walsh*, 262 N. Y. 140, 149-150 (1933); *People* v. *Miller*, 257 N. Y. 54, 57, 58-59 (1931); *Matter of Hughes* v. *Kings County Court*, 181 N. Y. Misc. 668, 672-673 (1943); *People* v. *Gatti*, 167 N. Y. Misc. 545 (1938); *Re Attorney General of the United States*, 160 N. Y. Misc. 533 (1937); *People* v. *Rogas*, 158 N. Y. Misc. 567 (1936); *People* v. *Wargo*, 149 N. Y. Misc. 461, 463-464 (1933); *People* v. *Kresel*, 142 N. Y. Misc. 88 (1931); *People* v. *Radeloff*, 140 N. Y. Misc. 690 (1931); *People* v. *Bellows*, 1 How. Pr. N. S. 149 (N. Y. O. & T., 1884); *State* v. *Cala*, 35 N. E. 2d 758, 760-761 (Ohio Ct. of Apps., 1940); *Colonigar* v. *State*, 91 Tex. Cr. R. 143, 146 (1922); *Jenkins* v. *State*, 45 Tex. Cr. R. 173, 176 (1903); *Mohler* v. *Commonwealth*, 132 Va. 713, 720 (1922); *State* v. *Clark*, 21 Wash. 2d 774, 778 (1944); *State* v. *Morrison*, 175 Wash. 656, 658 (1933); Note, 7 Fordham L. Rev. 449 (1938). Although the very early English common law did not recognize any privilege of inspection in criminal cases, the early English rule has been liberalized. Compare *Rex* v. *Holland*, 4 T. R. 690, 100 Eng. Rep. 1248 (1792) with *Rex* v. *Harrie*, 6 Carr. & Payne 105, 172 Eng. Rep. 1165 (1833) and *Reg.* v. *Spry*, 3 Cox C. C. 221 (1848).

the instant order, just as in some of the foregoing American common law cases, was designed to insure that defendants be properly informed of the factual issues.

It is interesting to note the observations of Judge Medina concerning a similar point in a civil antitrust proceeding:

> "I am going to find some way, whether by these interrogatories or some equivalent process, of advising the Government at some appropriate time to disclose to these defendants, to each of them, just exactly what they are charged with. . . . There is no use of our fussing about as to whether we call it a bill of particulars or call it answers to interrogatories.
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> • • • • •
>
> "What I am concerned about is seeing to it that when these defendants go into this trial they will know exactly what they have to meet factually, and that is what I think they are entitled to in some way or another" (Hearings in *United States* v. *Henry S. Morgan*, No. 43-757 (S. D. N. Y., October 30, 1947), as quoted in McAllister, "The Big Case: Procedural Problems in Antitrust Litigation" (1950), 64 Harv. L. Rev. 27, 31-32).

These observations apply *a fortiori* to a criminal proceeding in view of the guarantees of the Fifth and Sixth Amendments.

The decision of the court below contravenes the policy of the American common law decisions and of the Federal Rules of Criminal Procedure, which is to further the interests of justice and fairness by affording due notice to defendants of the charges against them and enabling them to prepare their defense.

III.

Rule 17(c) is the only one of the Federal Rules of Criminal Procedure which authorizes issuance and enforcement of subpoenas *duces tecum*. It was interpreted so narrowly by the court below that it cannot possibly perform

the function of providing a simple, expeditious, and general method of procuring the production of evidence for pre-trial inspection. This crippling interpretation of the Rule is as harmful to the Government as it is to defendants. In this connection, the Court may wish to take judicial notice of the fact that in May 1950, long before trial, the Government in a related criminal case, *United States* v. *Bowman Dairy Company, et al.*, 48 CR 361 (N. D. Ill.), employed Rule 17(c) to obtain considerable documentary evidence from one of the corporate petitioners herein. The decision below would foreclose the Government, after indictments, from pre-trial inspection of documentary evidence in the possession of defendants. Thus, an authoritative construction of Rule 17(c) would appear to be of importance to the Government as well as to private parties.

Absent an authoritative decision, there will surely be much floundering and confusion in the district courts on the elementary question of the proper method of obtaining evidence for pre-trial inspection. Certiorari should be granted here, as in *Hickman* v. *Taylor*, 329 U. S. 495, 497, dealing with the Civil Rules, because "This case presents an important problem under the Federal Rules" of Criminal Procedure.

Petitioners relied in the court below upon three paramount principles of statutory construction: (1) the principle that the general policy of an enactment permeates its every provision, and hence that Rule 17(c) must be applied consistently with the general policy of the Federal Rules of Criminal Procedure as expressed in Rule 2, *supra*, p. 4; (2) the principle that the plain language of a statute must be given full effect; and (3) the principle that where no ambiguity appears on the face of a statutory provision, extrinsic aids, such as legislative history of another statutory provision, should not be employed.

Judge Duffy's opinion ignores the policy expressed in Rule 2 and, as pointed out by Judge Lindley (R. 139), "does violence to the plain language" of Rule 17(c). Judge Duffy's opinion points out no ambiguity in the language of Rule 17(c) but nevertheless adopts an argument based on legislative history. The legislative history relied on, moreover, was not that of Rule 17(c) itself; it was that of another rule, Rule 16. In concluding that the limitations of Rule 16 must be read into Rule 17(c)[12], the court below erred by its reliance upon the legislative history of Rule 16. *Ex Parte Collett*, 337 U. S. 55, 61; *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 43-44; *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 266.

Apparently Judge Duffy relied (R. 131-134) upon the *ejusdem generis* rule in interpolating the limitations of Rule 16 into Rule 17(c). But the *ejusdem generis* rule is only to be followed where there is uncertainty in statutory language and where the result of its application will not conflict with the general purposes of the statute. *Gooch* v. *United States*, 297 U. S. 124, 128; *Securities and Exchange Commission* v. *Joiner Leasing Corp.*, 320 U. S. 344, 350-351. Here there is no uncertainty in the language of Rule 17(c), and the application of the *ejusdem generis* rule would contravene the liberal purposes of the Criminal Rules, which are declared in Rule 2.

Judge Duffy also decided that under the district court's interpretation, Rule 17(c) would operate as an "unrestricted pre-trial discovery device" and create "an almost unlimited right of discovery" (R. 134, 132). The

12. Of the three district court cases on which the court below relied (R. 132-134), only the *Brumfield* case took the position that Rule 17(c) should be limited by Rule 16. In that case, the court also gave the grand jury privilege and prematurity as reasons for denying the remedy sought. The *Hiss* and *Maryland & Virginia Milk* cases were decided on the bases of privilege, prematurity and broadness of the subpoenas, none of which is an issue here. In addition, the motion to quash the subpoena in the *Hiss* case was granted largely because of the *ex parte* nature of Judge Conger's order (9 F. R. D. at p. 516), whereas the order involved here was not an *ex parte* one.

contrary is true. Rule 17(c) is a discretionary rule and contains its own limitations; for the rule itself is merely permissive and, in addition, authorizes the district court to quash or modify unreasonable or oppressive subpoenas. The terms of Rule 17(c) are restricted and limited, and grant no "right" of discovery, but merely a privilege to inspect all, or part of, the subpoenaed documents, if the district court should decide that such inspection is warranted.

The concurring opinion of Judge Major, although recognizing that Rules 16 and 17(c) are each "designed to serve a separate and distinct purpose" (R. 138), holds that the word "person" in Rule 17(c) does not apply to the Government or its attorneys. This highly technical construction has never been adopted by any of the courts which have considered Rule 17(c), and was not urged in the Government's briefs in the court below. In fact, at the oral argument below, Government counsel repeatedly conceded that Rule 17(c) applied to the Government (R. 134, note 1). Moreover, Rule 17(c) is "substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure" (see note of Advisory Committee following Rule 17(c)), and Rule 45(b), which also uses the term "person", has been construed to include the Government within the meaning of that term. *Bowles* v. *Ackerman*, 4 F. R. D. 260 (S. D. N. Y.); *Zimmerman* v. *Poindexter*, 74 F. Supp. 933, 934 (D. Hawaii); *cf. United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341-342; *United States* v. *General Motors Corp.*, 2 F. R. D. 528 (N. D. Ill.).[13]

13. The Advisory Committee's note on Rule 45(b) states that it "broaden[s] U. S. C., Title 28, §636 (Production of books and writings) to include all actions and to extend *to any person*" (Italics supplied.) Section 636 was held to apply to production against the United States (*Third National Bank & Trust Co.* v. *United States*, 53 F. 2d 599 (C. A. 6); *United States* v. *Youngs*, 28 Fed. Cas. No. 16783 (10 Benedict 264) (S. D., N. Y.); *United States* v. *Hutton*, 26 Fed. Cas. No. 15,433 (10 Benedict 268) (S. D., N. Y.)).

Judge Major's opinion decides (R. 135) that a command to produce documents under Rule 17(c) may only be a part of a subpoena to give testimony under Rule 17(a); in effect, it holds that Rule 17(c) merely permits a *duces tecum* clause to be added to an *ad testificandum* subpoena. The analysis is incorrect. It is well recognized that a subpoena may contain either an *ad testificandum* clause or a *duces tecum* clause, or both. The lack of an *ad testificandum* clause does not invalidate a subpoena *duces tecum*. *Wilson* v. *United States*, 221 U. S. 361, 372-374; *Essgee Company* v. *United States*, 262 U. S. 151, 157.

Judge Major's opinion then asserts that to subpoena either party or an attorney for either party under Rule 17 to give testimony or produce documents would be a "novelty" and an "anomaly" (R. 135, 136), and concludes that "a party or an attorney" is not a "person" within the meaning of Rule 17(a) or of Rule 17(c). Hence, Judge Major declares, a party or attorney may not be subpoenaed under Rule 17(c) to produce documents. This conclusion ignores the possibility that a person may be both a "witness" and a "party", subject, of course, to personal privileges. In this case, the subpoena was not addressed to a party, but to an attorney for the United States. The argument as to whether a party is a person within the meaning of Rule 17(c) is thus not relevant here. Moreover, it is possible for a person to be both a "witness" and the attorney for a party, subject in that case to the attorney-client privilege. The Government, however, did not raise any question of privilege in the court below, and Judge Major's opinion is not rested on this ground.

Despite the suggestions to the contrary in Judge Major's opinion (R. 137-138), it would not be possible under Rule 17(c) to obtain, *ex parte*, inspection of documentary evidence "merely by filling in the blank space of a subpoena"

(R. 138), because Rule 17(c) expressly provides that it is for the court to direct production and to permit inspection. It was for this reason that the order in question was entered by the district court only after notice and full hearing.

IV.

The Rules of Criminal Procedure govern a wide variety of prosecutions, and were therefore so drafted as to give to the trial judges a liberal grant of discretion. The issue presented here is not merely an inspection problem, but concerns the discretion of a trial court to exercise intelligent pre-trial supervision to avoid confusion confounded in this type of criminal case—an intricate antitrust trial. The Federal Rules of Criminal Procedure should be construed to enable a district court to guide the orderly progress of a trial. The district court's inherent power to control the disposition of litigation pending before it should not be thwarted by a narrow construction of the pre-trial procedures provided by the Criminal Rules.[14]

The Judicial Conference of the United States in its report dated November 25, 1949, recognized the importance from the standpoint of the public interest of "effective, expeditious and economic disposition" of antitrust litigation (Report of the Judicial Conference of the United States held at Washington, D. C., September 22-24, 1949, pp. 26-27). Judges Wyzanski and Medina, before whom important antitrust cases are pending, have entered orders directed at both parties providing for pre-trial inspection and discovery that will expedite those cases and reduce

14. Cf. McAllister, "The Big Case: Procedural Problems in Anti-Trust Litigation" (1950), 64 Harv. L. Rev. 27, 61; Dession, "The New Federal Rules of Criminal Procedure: II" (1947), 56 Yale L. J. 197, 221-222; Dession, "The Trial of Economic and Technological Issues of Fact: I and II" (1949), 58 Yale L. J. 1019 and 1022. Professor Dession was a member of this Court's Advisory Committee on the Criminal Rules.

them to a manageable compass.[15] Rule 17(c) furnishes the trial judge in a criminal case with an effective tool to provide in advance for an orderly presentation of the evidence at the trial, to save the court's time and to enable defendants more precisely to prepare for trial.

It has recently been pointed out by another judge that the Government expects to inspect the documents of defendants in antitrust cases and should reciprocate. Thus, Judge Yankwich stated:

> "In all these [antitrust] cases, * * * the Government expects the utmost cooperation of the defendants or even *prospective defendants* in placing their files and records, ranging over periods of years, at the disposal of its agents. When objection is encountered, the widest use is made of the process of the courts. A justified criticism of the Government is, however, that *it is not so generous in reciprocating.* Thus, the Government stands on the liberal rules which allow them to plead the facts generally and resists *at all stages, every attempt to compel them,* through bills of particulars, to supply data which would give the defendants a definite idea of the line of attack which they may expect at the trial. Judges, in our circuit, including myself, have been rather generous in compelling disclosure, so as to *channel* the inquiry. I believe that this method has been time-saving, * * *." (Yankwich, "Observations on Anti-Trust Procedures" (1950), 10 F. R. D. 165, 168; author's italics).

The decision of the court below is unrealistic in failing to recognize the policy of the Federal Rules of Criminal Procedure that, in the interest of simplicity and of expedition of trials, a liberal discretion should be given to the trial judge in regard to pre-trial disclosure in order to "channel the inquiry." Review of the decision below by this Court would be plainly in the public interest in order to resolve

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15. See McAllister, *op. cit.*, pp. 28, 29, 31-32, 36, 39, 53 and 59.

the varying interpretations of Rule 17(c) adopted by the lower courts, and so that the liberal purpose of the rules may be vitalized and the administration of justice expedited.

Conclusion.

The decision below voices an issue which has not been, but should be, settled by this Court, and it conflicts with the decision of the Court of Appeals for the Second Circuit. Several district court decisions are also in conflict. The questions presented are of general importance. Accordingly, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 435

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Petitioners,

vs.

UNITED STATES OF AMERICA AND
WILLIS L. HOTCHKISS,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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January 12, 1951.

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1. Throughout its brief (see, *e. g.*, pp. 13-14, 15-16) the Government attacks the breadth of the subpoena *duces tecum* and contends that it would constitute a "fishing expedition" (Br. 16). However, the Government has already waived any objection as to the breadth of the subpoena. For example, Mr. Hotchkiss, the respondent, informed the District Court that he had no "particular objection" to the form of the subpoena, and that "the government did not and never has been in this proceeding challenging" the form of the subpoena (R. 61, 62). Likewise, this point was not raised in the Government's motion to quash the subpoena (R. 72-73) or in the Statement of Points Relied Upon on appeal (R. 103-104). Accordingly, the Court of Appeals refused to consider this point,

despite the Government's belated attempts to raise it, and the Government is precluded from raising the point here. *United States* v. *Atkinson*, 297 U. S. 157, *Weade* v. *Dichmann Co.*, 337 U. S. 801. Whether only "particular identifiable objects of evidence" (Br. 19-20), or more generally "designated" categories of documents or objects (Rule 17(c)) may be inspected is not the question here.[1] The Court below holds that no documents, however broadly or narrowly designated, may be inspected under Rule 17(c) unless included in the scope of Rule 16. Moreover, as this Court noted in *Hickman* v. *Taylor*, 329 U. S. 495, 507, when considering the civil discovery rules,

> "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

These remarks apply even more plainly to criminal proceedings. See Berger and Krash, "Government Immunity from Discovery", 59 Yale L. J. 1451, 1453-54, 1456-60 (1950).

2. The Government contends (Br. 13, 15, 16) that Rule 17(c) permits the production of documentary evidence only if it is to be offered in evidence at the trial. This contention is unsupportable, for Rule 17(c) provides that the court may direct documentary evidence to be produced "*at a time prior to the trial* or prior to the time when they

[1] In *Brown* v. *United States*, 276 U. S. 134, 143, the Court held that a subpoena need only specify "with reasonable particularity the subjects to which the documents called for relate." As pointed out in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554, unless such a liberal rule is applied, one "would be compelled to designate each particular paper which it desires, which presupposes an accurate knowledge of such papers, which the [party] * * * desiring the papers would probably rarely, if ever, have."

are to be offered in evidence" (Italics supplied). The Government's contention ignores the italicized language and the use of the disjunctive word "or" after that clause and thus renders it difficult to follow the claim (Br. 15) that this construction "preserves unimpaired the important function of Rule 17(c)". Instead, as Judge Lindley's dissent shows (R. 139), the opinion below "read[s] Rule 17(c) out of the books—completely delete[s] it", and "does violence to the plain language of the rule".

3. It is urged by the Government (Br. 16-17) that there is no conflict between the decision below and that in *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2). This position is untenable in view of the Government's later concession that in the *Bondy* case the Court of Appeals held that under Rule 17(c) "a district court has power to issue a subpoena *duces tecum*" (Br. 17) ordering the Government to produce documents which could not be obtained under Rule 16, because they were not obtained from or belonging to the defendants or obtained from others by seizure or process. Since the court below held to the contrary, it is submitted that a direct conflict does exist.

4. In the petition for certiorari, it was demonstrated that the resolution of the questions presented is of great significance. The Government's brief presents no argument to the contrary, in effect conceding that this case involves issues of general importance. Counsel are aware of no previous case in which this Court has considered the subject of discovery by defendants in criminal cases, either at common law or under the Federal Rules of Criminal Procedure.

Conclusion.

For the foregoing reasons and the reasons presented in the Petition for a Writ of Certiorari, the petition should be granted.

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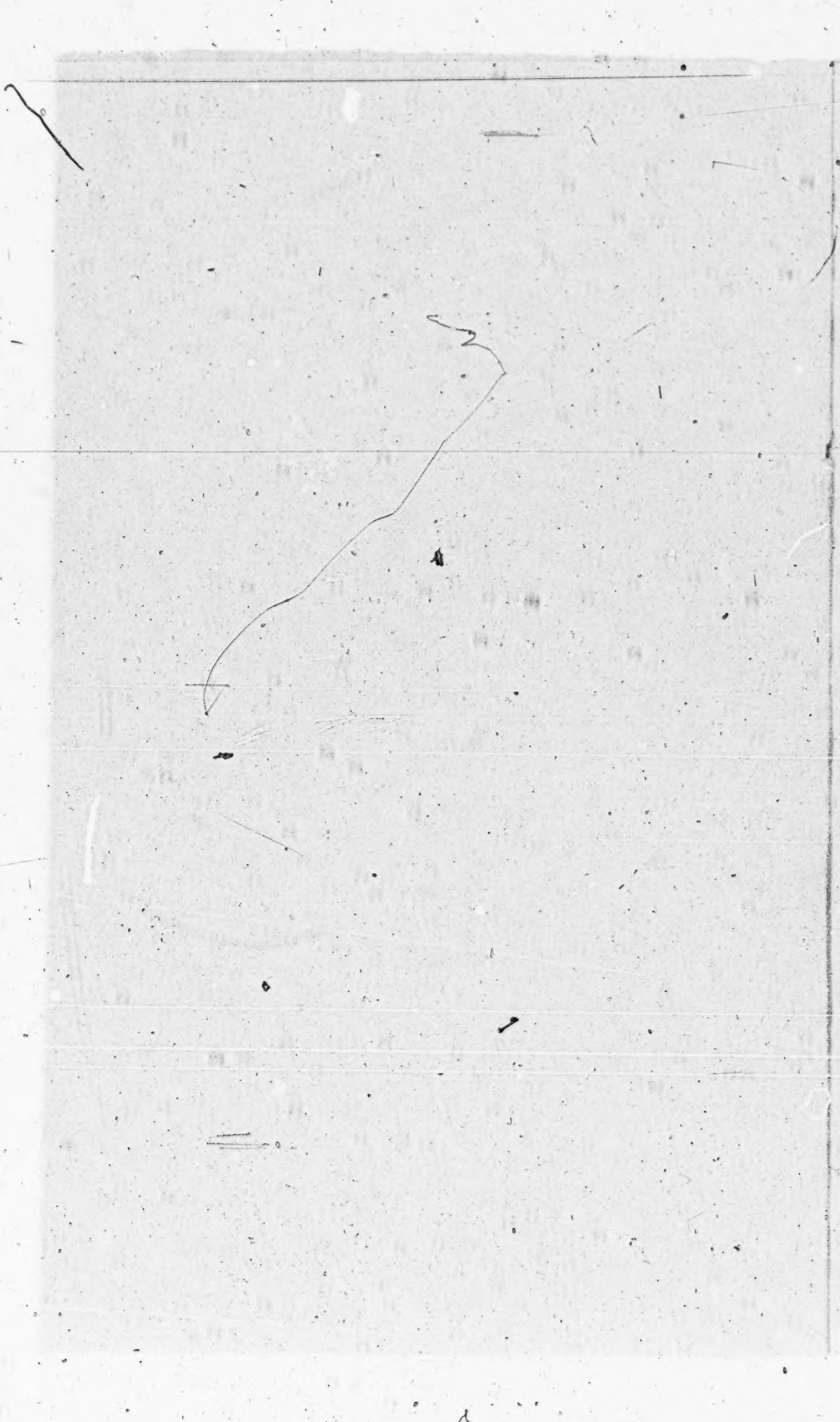

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 435.

BOWMAN DAIRY COMPANY, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND WILLIS L. HOTCHKISS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The majority, concurring and dissenting opinions (R. 128-139) of the Court of Appeals are reported at 185 F. 2d 159.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1950 (R. 140). The petition for a writ of certiorari was filed on December 6, 1950, and was granted on January 15, 1951 (R. 146). The jurisdiction of this Court rests upon 28 U. S. C. Section 1254(1).

QUESTION PRESENTED

Whether the district court had discretion, in a criminal case, to permit any pre-trial inspection of documents in the control of an attorney for the Government, except as permitted under Rule 16.

RULES INVOLVED

Rule 17(c) of the Federal Rules of Criminal Procedure provides as follows:

> "For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

Rule 16 provides as follows:

> "Discovery and Inspection. Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his de-

fense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

Rule 2 provides as follows:

"Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

STATEMENT

The indictment in this case charges eight corporations and nine corporate officers with a conspiracy in violation of Section 1 of the Sherman Act (R. 3-9).[1] Motions by the petitioners, defendants in the district court, to dismiss the indictment (R. 115-116) were based in part upon the vagueness and indefiniteness of the charge therein laid. These motions were denied on April 13, 1949 (R. 117). Thereafter, on June 13, 1949, each petitioner filed three motions[2] (R. 117):

1. A motion under Rule 17(c) of the Federal Rules of Criminal Procedure for a subpoena *duces tecum* requiring the Government to produce prior to the trial, for petitioners' inspection, certain documents obtained by the Government by means other than seizure or process and not obtained from or belonging to petitioners (R. 10-27);

2. A motion under Rule 16 for an order directing the Government to produce for inspection certain other documents which the Government had obtained by seizure or process (R. 28-46);[3]

3. A motion for a bill of particulars (R. 117).

The district court granted parts of each petitioner's first two motions and denied the motions for a bill of particulars except in two minor respects (R. 64, 69-70, 75).

The motions for a subpoena *duces tecum* under Rule 17(c) described fully the issues to which the desired documents related (R. 10-27). They were served on Government coun-

1. The indictment was returned on July 30, 1948, by a grand jury sitting in the Northern District of Illinois, Eastern Division (R. 2).

2. The petitioners also filed a motion to strike surplusage from the indictment (R. 117); this motion was granted (R. 75).

3. The Government vigorously resisted this motion both by a brief and by oral argument at the October 24, 1949, hearing thereon (R. 119). The statement in Judge Duffy's opinion (R. 128-129) that "the Government did not object to the motion under Rule 16" is incorrect.

sel and presented to the district court before the subpoena was issued (R. 117, 48-49). At a hearing on October 24, 1949 (R. 119), with Government counsel participating, the court directed the petitioners to limit the scope of the proposed subpoena (see parenthetical exceptions and limiting clauses set off by (a) and (b) and (a), (b) and (c) in quotation from subpoena, *infra*). The motions for a subpoena were then granted orally from the bench on that day (R. 119). The subpoena *duces tecum* was addressed to respondent Willis L. Hotchkiss, Special Assistant to the Attorney General, and was served on November 1, 1949 (R. 48-50). On November 7, 1949, after a hearing to settle the order to comply with the subpoena (R. 51-63), the district court entered an order (R. 69-71) directing respondent Hotchkiss, pursuant to Rule 17(c), to produce for petitioners' inspection the books, papers and documents designated in the subpoena. A copy of the subpoena was attached to the district court's order. It directed production of (R. 71):

> "* * * all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."

The Government subsequently moved to quash the subpoena and to set aside the order of November 7, 1949, which directed compliance therewith (R. 72-73). The grounds for the motion were: (a) under Rule 17(c) of the Federal Rules of Criminal Procedure, a subpoena for the production of documents may not issue against an attorney for the Government; (b) the district court had no jurisdiction to order the attorneys for the Government to produce, for inspection by defendants, documents and other papers designated in a subpoena issued under Rule 17(c); and (c) the right of defendants in criminal proceedings to obtain access to documents and other papers in the custody of an "Attorney for the Government", as defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted by Rule 16 of said Rules (R. 72-73). The Government did not challenge the form or scope, or the timeliness of the subpoena (R. 61, 62, 72-73, 74, 103-104).

On January 4, 1950, the district court denied the Government's motion to quash (R. 83-84). Respondent Hotchkiss thereupon submitted to the district court an affidavit, which averred that all of the documents which the district court had ordered produced were in his custody (R. 84-85). The statement reiterated the Government's contention that the district court had no jurisdiction under Rule 17(c) to enter a pre-trial inspection order against an attorney for the Government, and set forth that the respondent Hotchkiss, acting on the advice and instructions of the Attorney General of the United States and the Assistant Attorney General in charge of the Antitrust Division, respectfully declined to comply with the district court's order of November 7, 1949 (R. 86-87). Although this statement intimated

that some of the documents might be privileged (R. 85), this point was not argued in the district court and was not briefed or argued in the court below.[4]

On January 5, 1950, the district court entered an order finding respondent Hotchkiss guilty of contempt for refusing to produce the documents designated in the subpoena *duces tecum*, and for refusing to comply with the court's order of November 7, 1949. The order committed him to the custody of the Attorney General until he should comply with the provisions of the subpoena *duces tecum* and should obey the district court's order of November 7, 1949, or until he should be discharged from custody by due process of law. (R. 99.) On the same day, respondent Hotchkiss appealed from the order holding him in contempt of court (R. 100) and, by order of the Court of Appeals for the Seventh Circuit, he was admitted to bail on his own recognizance until further order of that court (R. 102).

On November 7, 1950, the court of appeals entered a judgment reversing the order of the district court. Judge Duffy rendered the opinion of the court, Chief Judge Major rendered a concurring opinion, and Judge Lindley rendered a dissenting opinion. (R. 128-140.) Judge Duffy's opinion held (R. 134) that "Rule 17(c) provides for the traditional type of trial subpoena, although as a matter of convenience it may be made returnable before the actual date of trial." Judge Duffy objected in particular only to the fact that the instant subpoena called for the production of documents which could not be reached under

4. In these proceedings, the Government has never relied on Department of Justice Order No. 3229 and Supplement No. 2 thereto which are involved in *United States* ex rel. *Roger Touhy* v. *Ragen and McSwain*, 180 F. 2d 321 (C. A. 7), now pending here, No. 83, present Term.

Rule 16. "It does not make sense," his opinion stated (R. 132), "to have created in one rule [16] a privilege of discovery limited to documents and papers belonging to the defendant or taken from others by seizure or process and at the same time to create in Rule 17(c) an almost *unlimited right of discovery* by use of the subpoena provisions" (italics supplied). Further to the same effect, Judge Duffy stated (R. 134) that Rule 17(c) "should not be construed so that the carefully drawn limitations in Rule 16 become meaningless * * * it may not be converted into an *unrestricted pre-trial discovery device*" (italics supplied). Since Judge Duffy drew only upon Rule 16 in cutting down the plain, broad language of Rule 17(c), and since Rule 16 applies only to discovery against the Government, it is accurate to describe Judge Duffy's opinion as based upon the fact that this subpoena was addressed to the Government.

Chief Judge Major's opinion concurred in Judge Duffy's reasoning (R. 134) and further took the position that the Government and its attorneys were excluded from the scope of Rule 17(c), and that Rule 17(c) applies merely to witnesses who are not parties or attorneys for parties (R. 134-138).

In his dissenting opinion, Judge Lindley pointed out that his "brethren read Rule 17(c) out of the books—completely delete it." He stated that the majority opinion "does violence to the plain language of" Rule 17(c). Judge Lindley was of the opinion that under Rule 17(c), the extent of relief to be granted thereunder was placed "within the discretion of the trial court". (R. 139.)

SUMMARY OF ARGUMENT.

I.

The plain, unambiguous language of Rule 17(c) of the Federal Rules of Criminal Procedure empowered the district court to permit the petitioners to inspect, "prior to the trial," the requested documents in respondent Hotchkiss' possession as designated in the subpoena *duces tecum* served upon him.

A. Since no problem is presented of construing or interpreting ambiguous or uncertain language in Rule 17(c), there is no need to examine its history. *Ex Parte Collett*, 337 U. S. 55, 61; *Wallace* v. *Cutten*, 298 U. S. 229, 237; *Packard Co.* v. *National Labor Relations Board*, 330 U. S. 485, 490-492; *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44.

The limitations on discovery pursuant to Rule 16 may not be read into Rule 17(c) by virtue of the *ejusdem generis* rule, because there is no uncertainty in the language of Rule 17(c), and the application of the *ejusdem generis* rule would contravene the liberal purposes of the Criminal Rules.

B. The liberal purposes of the Criminal Rules, as expressed in Rule 2, would be frustrated by reading the limitations of Rule 16 into Rule 17(c). In applying Rule 17(c) in this case, the district judge expressly stated that his purposes were to eliminate needless expense and delay and to provide for the just determination of this proceeding. These are the purposes of all of the Rules as expressed in Rule 2.

Rule 17(c) recognizes the public interest in disclosing relevant material, in an endeavor to arrive at a just determination of a criminal case. It was designed to give a trial court discretion to exercise intelligent pre-trial supervision in order to remove complications which would otherwise occur during the course of an intricate antitrust trial. It should not be so construed as to curtail the district court's power to expedite litigation, to provide in advance for an orderly presentation of the evidence at the trial, and to enable defendants more precisely to prepare for trial.

C. The history of Rule 17(c) shows that it was drafted "in the interests of fairness and for the purposes of preventing delay during the trial, particularly in cases where numerous documents may have been subpoenaed.". The district court's remarks in issuing the instant order show that the court was motivated by these very considerations.

D. Rules 16 and 17(c) are not in conflict and there is no need to impose upon Rule 17(c) the limits which apply to Rule 16.

1. Rule 17(c) contains adequate limitations of its own and does not create an "unlimited" privilege or right of pre-trial discovery.

2. Rule 17(c) codifies the former subpoena *duces tecum* practice under the common law and under Section 1651(a) of the Judicial Code. Its basic foundation is the right, secured by the Sixth Amendment, of every person accused of crime to have compulsory process to obtain witnesses in his favor. Rule 16, on the other hand, is a restraint upon the prosecutor. It was designed to prevent him, by withholding relevant material until the trial, from disrupting the operation of a defendant's business and impeding the efforts of the accused to prepare his defense. Thus Rule 16 merely grants *additional protection* to a defendant, and is not in derogation of his otherwise broader privilege of obtaining such process as is necessary properly to present his defense.

3. The Government has waived any objection to the scope of the subpoena *duces tecum* other than its objection founded on the restrictions of Rule 16. Accordingly, it may not raise the "fishing expedition" cry here. *United States* v. *Atkinson*, 297 U. S. 157; *Weade* v. *Dichmann, Wright & Pugh*, 337 U. S. 801. Moreover, that objection is not well-founded. *Brown* v. *United States*, 276 U. S. 134, 143; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554; *United States* v. *Burr*, 25 Fed. Cas. No. 14694 (C. C. D. Va.); *Hickman* v. *Taylor*, 329 U. S. 495, 507. In essence, the Government's objection to the scope of the subpoena rests on "privilege" but it would, if sustained, prevent the courts from determining when and to what extent a privilege from discovery should attach. The record affords no foundation for the determination of this privilege argument, for the Government has never directly expressed a claim that *any* of the documents which it refuses to produce are privileged.

4. A subpoena under Rule 17(c) may properly be addressed to an attorney for the Government. The history of Rule 17(c) shows that it is substantially the same as Civil Rule 45(b), which has been held applicable to the Government. In effect, the opinion below holds that Rule 17(c) does not authorize certain types of subpoenas against the Government, but such a crippling interpretation of Rule 17(c) would be contrary to previous federal and state practice and would seriously curtail the discretionary powers of the trial judge over criminal proceedings.

5. The language of Rule 17(c) and its history show that pre-trial inspection thereunder need not be limited to evidentiary material which is to be offered at the trial by the party subpoenaing it. Moreover, such a limitation would be impractical.

6. The history of Rule 17(c) shows that it was designed to permit the production of documents "independently of testimony," and therefore it is immaterial that the present subpoena did not contain an *ad testificandum* clause.

II.

Decisions based on the American common law, the Constitution, Rule 17(c) and the Judicial Code, afford ample precedent for the action of the trial court.

A. Although pre-trial inspection of documents in criminal cases was not permissible at common law in England in the Eighteenth Century, the English rule has been liberalized. The American common law cases did not adhere to the early English rule. For example, in *United States* v. *Burr*, 25 Fed. Cas. No. 14692d, 14694 (C. C. D. Va.), Chief Justice Marshall held that under the Sixth Amendment an accused was entitled to a subpoena *duces tecum* to obtain pre-trial inspection of documents that might be material to his defense. Cf. *United States* v. *Coplon*, 185 F. 2d 629, 637-638 (C. A. 2).

Even disregarding Rule 17(c), the instant subpoena would be lawful at common law and under the Fifth and Sixth Amendments. Section 1651(a) of the Judicial Code, providing that Federal courts may issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law", is an additional authority for the district court's order. Cf. *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 609.

B. Judicial interpretations of Rule 17(c) support the views adopted by the trial court. In *United States* v. *Bondy*, 171 F. 2d 642, the Court of Appeals for the Second Circuit rejected the arguments advanced here by the Government. In addition, three district courts and a New Jersey court interpreting an identical rule, have granted subpoenas *duces tecum* under Rule 17(c) directed to the prosecutor. The three contrary district court decisions were decided largely on issues not involved here, and they do not justify a decision that Rule 17(c) is unreasonable unless interpreted as if its language incorporated that of Rule 16.

ARGUMENT.

Introduction.

This case presents a problem of statutory interpretation. Petitioners contend that the applicable rules of statutory interpretation require that the clear, unambiguous language of Rule 17(c) be given full effect, since to do so would further, rather than obstruct, the general policies of the Federal Rules of Criminal Procedure announced in Rule 2. If this is done, the action of the trial court will be upheld. The court below did not so interpret the language of Rule 17(c) but instead interpreted it to be limited by Rule 16, a separate and independent rule. Part I of petitioners' brief will show that Rule 17(c) was properly interpreted and applied by the district court.

The full significance of this case, however, appears only when Rule 17(c) is read in the light of common law precedents and constitutional principles. Part II of this brief, therefore, will consider the common law and constitutional doctrines which sanction the action taken by the trial court.

I.

THE FEDERAL RULES OF CRIMINAL PROCEDURE AUTHORIZED THE DISTRICT COURT TO ORDER RESPONDENT HOTCHKISS TO PRODUCE THE SUBPOENAED DOCUMENTS FOR PRETRIAL INSPECTION BY PETITIONERS.

The plain, unambiguous language of Rule 17(c) empowered the District Court to enter the inspection order.

In pertinent part, Rule 17(c) of the Federal Rules of Criminal Procedure (*supra*, p. 2) provides:

> "The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portion thereof to be inspected by the parties and their attorneys."

By its terms, this provision empowered the district court to permit the petitioners and their attorneys to inspect, "prior to the trial", the subpoenaed documents.

The majority opinion below does not rely upon any of the express terms of Rule 17(c) in reversing the trial court. Neither does that opinion point to any ambiguity or uncertainty in the Rule, but concedes (R. 134) that "the language of Rule 17(c) is broad." When the subpoena and order are read in the light of the specific language of Rule 17(c), it is obvious that the trial court acted within the purview of the Rule.

Parts I-A through I-C of this brief will demonstrate that, although there is no need to resort to them in view of the clarity of the language of Rule 17(c), the general policies of the Federal Rules of Criminal Procedure and the history of Rule 17(c) support the trial court's application of the rule to this case. Part I-D will show that the separate and independent provisions of Rule 16 do not conflict with, and should not be grafted into, the broad provisions of Rule 17(c).

A. Since the Language of Rule 17(c) Is Plain, It Is Unnecessary to Consider Its History.

Since no problem is presented of construing or interpreting ambiguous or uncertain language in Rule 17(c), there is no need to examine its history. As this Court stated in *Ex Parte Collett*, 337 U. S. 55, 61:

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of § 1404(a) but from its legislative history. *The short answer is that there is no need to refer to the legislative history where the statutory language is clear.* 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions." [Italics supplied.]

Mr. Justice Brandeis, in *Wallace* v. *Cutten*, 298 U. S. 229, pointed out (at p. 237):

> "It would be inappropriate for us to discuss these, and other, arguments presented. The language of § 6 (b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said in *Iselin* v. *United States*, 270 U. S. 245, 250-251: 'The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably [possibly] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'"

While the *Cutten* case involved an attempt to enlarge the plain meaning of the statute, *Packard Co.* v. *National Labor Relations Board*, 330 U. S. 485, applied the same rule

in refusing to constrict the plain meaning of a statute. Despite reasons of policy (p. 493) and of legislative history (p. 492) for interpreting the term, "employees," in the Act as excluding foremen, this Court stated (330 U. S. at p. 490), "the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms"; and again (p. 492), "There is, however, no ambiguity in this Act to be clarified by resort to legislative history * * *."

It was thus improper for the court below to "create exceptions or qualifications at odds with * * * [the] plain terms" of Rule 17 (c) by resorting to the history of Rule 16.

In *Utah Junk Co.* v. *Porter*, 328 U. S. 39, the Court construed certain procedural provisions of the Emergency Price Control Act of 1942, as amended by the Stabilization Act of June 30, 1944. By amendment, Congress had deleted a sixty-day period for protesting provisions of price schedules and (328 U. S. at p. 42) "amended the procedure so that a protest * * * could be filed 'at any time' after the effective date." The Government argued that the 1944 amendment applied only to price schedules which were active when the Act was passed, and not to those which had been superseded by that time. The Court rejected this argument in terms which are applicable here, stating (328 U. S. at p. 44):

> "We find nothing in this language of the 1944 amendment of § 203 (a), or in its history, or in any illumination otherwise shed upon the terms this legislation, to justify *reading in a qualification that Congress has left out.*
>
> "All construction is the ascertainment of meaning. And literalness may strangle meaning. *But in construing a definite procedural provision we do well to*

stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy." [Italics supplied.][5]

As shown at pp. 18-25, *infra*, insofar as broad policy considerations are relevant here, "they tell against cutting down the natural meaning of the language" (*Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44) of Rule 17(c).

In reliance on the Government's reply brief, the court below apparently resorted to the *ejusdem generis* rule in grafting the limitations of Rule 16 into Rule 17(c). However, the *ejusdem generis* rule "cannot be employed to render general words meaningless." *United States* v. *Alpers*, 338 U. S. 680, 682. As stated in *Browder* v. *United States*, 312 U. S. 335, 338, "No single argument has more weight in statutory interpretation than" coverage by "The plain meaning of the words of the act." The *ejusdem generis* rule is only to be followed where there is uncertainty in the statutory language and where the result of its application will not conflict with the general purposes of the statute. *Gooch* v. *United States*, 297 U. S. 124, 128; *Securities and Exchange Commission* v. *Joiner Leasing Corp.*, 320 U. S. 344, 350-351.[6] Here there is no uncertainty in the language of Rule 17(c), and the application of the *ejusdem generis* rule would contravene the liberal purposes of the Criminal Rules, which are declared in Rule 2 (discussed *infra*, pp. 18-20).

In view of the clarity of Rule 17(c), resort to its legislative history is thus unnecessary, and the *ejusdem generis* rule does not make Rule 16 or its history pertinent to consideration of the meaning of Rule 17(c). Moreover, as is

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5. See also *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 530; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 45; and *United States* v. *Bowen*, 100 U. S. 508, 513.

6. See also pp. 6-11, 17 of the Government's brief in *United States* v. *Alpers*, No. 217, October Term, 1949.

demonstrated *infra*, pp. 25-28 and 29-36, such extrinsic aids, though unnecessary here, support the action of the trial court rather than the decision of the court of appeals.

B. The Trial Court's Interpretation of Rule 17(c) Conforms to the Liberal Policies of the Federal Rules of Criminal Procedure.

The court below held, and the Government here contends, that Rule 17(c) must be read in the light of Rule 16 and that, accordingly, the petitioners may not inspect before trial any documents in the Government's possession *unless they belong to the petitioners, were obtained from them, or were obtained from others by seizure or process* (R. 134; Br. in Opp. 6, 9-12, 15-16). The general policies of the Federal Rules of Criminal Procedure preclude this narrow construction.

The Government does not contend that the district court's interpretation of Rule 17(c) placed that Rule in conflict with the general policies of the Federal Rules of Criminal Procedure. On the contrary, it is evident from the terms and implications of Criminal Rule 2, that the district court's interpretation of Rule 17(c) is consistent with the general purposes of the Rules, while the interpretation advanced by the court below conflicts with those purposes.

The fundamental policies of the Federal Rules of Criminal Procedure are expressed as follows in Rule 2:

> "Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

Dean (now Chief Justice) Arthur T. Vanderbilt, Chairman of this Court's Advisory Committee on these Rules,

addressed the following remarks to the opening session of the Institute on Federal Rules of Criminal Procedure in New York City on February 15, 1946:[7]

> "I regard Rule 2 as the most important rule of the whole set. It sets forth that these Rules are intended to provide for a just determination of every criminal proceeding. It announces that they should be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. The rule in a sense corresponds with the last sentence of Rule 1 of the Federal Rules of Civil Procedure, which provides that they shall be construed to secure a just, speedy and inexpensive determination of every civil action. Our Rule 2 spells out the intent in somewhat greater detail because of the greater necessity of overcoming some ancient notions of criminal proceedings as a game.[8]
>
> "The purpose of the Committee in inserting the rule is to indicate to the trial judges in the first instance and to the appellate judges on review that they not only have the power but the responsibility of seeing to it that the Rules are interpreted and applied so that they do in fact bring about a just determination of every criminal proceeding and that they do in fact secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Rule 2 expresses the spirit that is intended to motivate the application of all the sixty rules promulgated by the Supreme Court and to make it very clear that they are not in any case to be interpreted technically so as to defeat the ends of justice."

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7. Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), pp. 120-121.

8. Dean Wigmore also disapproved of regarding criminal proceedings as a game in which the prosecution's evidence would remain undisclosed until the trial. See 6 Wigmore on Evidence (3rd ed. 1940) §§ 1845, 1850, 1859, 1859*g*, 1863. See also Berger and Krash, "Government Immunity from Discovery" (1950), 59 Yale L. J. 1451.

To circumscribe the clear, unambiguous provisions of Rule 17(c) with the narrow provisions of Rule 16 would be contrary to Dean Vanderbilt's admonition not to interpret a rule "technically so as to defeat the ends of justice." It would ignore what he terms "the greater necessity of overcoming some ancient notions of criminal proceedings as a game."

The objectives stated in Criminal Rule 2 are comparable to those of the Federal Rules of Civil Procedure, Rule 1 of which provides that the Civil Rules:

> "shall be construed to secure the just, speedy, and inexpensive determination of every action."

In *Hickman* v. *Taylor*, 329 U. S. 495, the Court epitomized the conclusions of many courts that the discovery procedures provided by those rules are effective means of advancing the ends of justice, fairness and economy, when it stated (329 U. S. at p. 507): "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." In view of the guarantees of the Fifth and Sixth Amendments, this statement is even more applicable to criminal proceedings. In fact, "The [inspection] rule governing criminal prosecutions might well be given wider scope" than the corresponding provisions in the Civil Rules.[9]

The district court was fully aware of the broad policies of the Criminal Rules, when it dealt with the issue now on appeal. As the court stated in the proceedings on November 7, 1949, the date on which it exercised its discretion to enter the order directing Government counsel to obey the subpoena *duces tecum* (R. 62):

> "Well, we have had quite a broad experience with the new civil rules, and they have been a great step

9. Berger and Krash, "Government Immunity from Discovery" (1950), 59 Yale L. J. 1451, 1452 (note 8), 1466.

forward in the handling of litigation, and they have brought progress. And we have used them to require the litigants to show their facts on the table to speed up and bring an end to litigation. * * * instead of taking six months to try a case it really ought to be tried in two or three weeks if we can do it.

"I know how offensive an idea it is to a lawyer to make him show his case, that it is much like plunging a dagger into his heart. But the judge takes a somewhat different view of it to the end of getting through with the litigation and doing justice between the parties. * * *"

Thus the elimination of needless expense and delay was a primary consideration which led the court to interpret Rule 17(c) as it did.

The court was equally mindful of the purpose of the Rules to provide for the just determination of every criminal action and to secure fairness in procedure. At the conclusion of the hearing on January 4, 1950, in deciding that respondent Hotchkiss should be found in contempt of court, Judge Barnes earnestly declared (R. 82):

"When the United States stands in this court or in any other court and says that it has a right to maintain in the files of its officers papers which may be relevant to the issues to be determined in court—when the United States says that it has a right to do that and to refuse such information to parties litigant, then it is taking a long, long step toward a police state.

"That is exactly what you are doing. You might as well realize * * * that if you are sustained in this position which you are taking here which you do by the direction of the Attorney General, then you and your associates are taking a long, long step toward a police state, and you are saying in effect that, 'the court shall not determine whether papers which we have in our control have any bearing upon these issues; we determine that, we, the police power of the United

States are going to determine that, and the courts are not permitted to do that.'

"Now, if we are going to take that long, long step toward the police state which you propose to take, and which you will take right now—and will take if this court and other courts permit you, you do it without * * * [my] voluntary cooperation. Some other court that has more power than I will have to say that you have a right to take that step, which I say is a step toward the police state."

That the district court's interpretation of Rule 17(c) was proper and within its discretionary power appears from a consideration of the circumstances from which the question arose. The indictment (R. 3-9) is barren of specifications as to when, where, and through whom any of the petitioners performed any of the acts, omissions, or types of acts or omissions of which they are accused.[10] For eight large dairy companies to prepare a defense to an indictment founded on their innumerable wholesale sales over "approximately seven years" (R. 6), is impossible without more particular knowledge of the specific acts or omissions which the Government intends to prove. In the same order in which the court denied the Government's motion to quash the subpoena, it determined petitioners' motions for an extensive bill of particulars. The court denied the requests for all particulars except those relating to when and through whom each of the defendants joined the alleged conspiracy (R. 75).

By providing defendants with the opportunity to inspect documents in the possession of the prosecution, Rule 17(c) helps to eliminate unfair surprise, unjustifiable ex-

10. Rule 7(c) of the Federal Rules of Criminal Procedure abolished the former, detailed, long form of indictment and now requires "a plain, concise and definite" statement. Like the newer forms of pleadings in civil cases, these simpler indictments serve a notice function primarily and must be supplemented by reasonable inspection of documentary materials "prior to the trial".

pense, and needless delay during the trial of a case, and assists in bringing about a just determination of a proceeding. These objectives were sought to be achieved in this case by permitting the petitioners to inspect, "prior to the trial", documentary materials which would give them an opportunity to know more exactly the issues in the cause. Inspection of the documents in advance of the trial, rather than during its course, would greatly aid petitioners in determining the relevant facts and in unearthing other documents and records bearing on their innocence.

It is well established that "The public interest in a full and fair hearing of all disputes between individuals and between individuals and the state calls for the production and disclosure of all evidence relevant to the issues in dispute."[11] Thus, Federal Judge Emerich B. Freed, formerly a United States Attorney, recently stated that

> "* * * it should be the policy of the law to permit as broad a scope of inspection and discovery in criminal cases as apply in civil trials. I cannot believe that any one will be deprived of a right by * * * means of unearthing the facts, whether those facts are pertinent in a criminal prosecution or a civil action." (33 American Bar Ass'n Journal 1010, 1068 (1947).)

Rule 17(c) recognized this public interest. As stated by Wendell Berge, then Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, its pre-trial inspection feature was designed "to reduce the element of surprise, and * * * to facilitate the trial of cases."[12]

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11. Sanford, "Evidentiary Privileges against the Production of Data within the Control of Executive Departments" (1949), 3 Vanderbilt L. Rev. 73; see also Berger and Krash, "Government Immunity from Discovery" (1950), 59 Yale L. J. 1451, 1466.

12. Berge, "The Proposed Federal Rules of Criminal Procedure" (1943), 42 Mich. L. Rev. 353, 368. Before heading the Antitrust Division, Mr. Berge was Assistant Attorney General in charge of the Criminal Division of the Department of Justice.

The Rules of Criminal Procedure govern a wide variety of prosecutions. The issue presented here is not merely an inspection problem, but concerns the discretion of a trial court to exercise intelligent supervision of an intricate criminal antitrust case. The Federal Rules of Criminal Procedure should be construed to enable a district court to guide the orderly progress of a trial. The district court's inherent power to control the disposition of litigation pending before it should not be thwarted by a narrow construction of the pre-trial procedures provided by the Criminal Rules.[13]

The Judicial Conference of the United States in its report dated November 25, 1949, recognized the significance, from the standpoint of the public interest, of "effective, expeditious and economic disposition" of anti-trust litigation (Report of the Judicial Conference of the United States held at Washington, D. C., September 22-24, 1949, pp. 26-27). Judges Wyzanski and Medina, before whom important antitrust cases are pending, have entered orders directed to both parties providing for pre-trial inspection and discovery calculated to expedite those cases and reduce them to a manageable compass.[14] Rule 17(c) furnishes the trial judge in a criminal case with an effective tool to provide in advance for an orderly presentation of the evidence at the trial, to save the court's time and to enable defendants more precisely to prepare for trial.

It has recently been pointed out that the Government

13. Cf. McAllister, "The Big Case: Procedural Problems in Anti-Trust Litigation" (1950), 64 Harv. L. Rev. 27, 61; Dession, "The New Federal Rules of Criminal Procedure: II" (1947), 56 Yale L. J. 197, 221-222; Dession, "The Trial of Economic and Technological Issues of Fact: I and II" (1949), 58 Yale L. J. 1019 and 1242. Professor Dession was a member of this Court's Advisory Committee on the Criminal Rules.

14. See McAllister, *op. cit.*, pp. 28, 29, 31-32, 36, 39, 53 and 59.

should reciprocate in the inspection of documents in anti-trust cases. Thus, Judge Yankwich stated:

> "In all these [antitrust] cases, * * * the Government expects the utmost cooperation of the defendants or even *prospective defendants* in placing their files and records, ranging over periods of years, at the disposal of its agents. When objection is encountered, the widest use is made of the process of the courts. A justified criticism of the Government is, however, that *it is not so generous in reciprocating.* Thus, the Government stands on the liberal rules which allow them to plead the facts generally and resists *at all stages, every attempt to compel them,* through bills of particulars, to supply data which would give the defendants a definite idea of the line of attack which they may expect at the trial. Judges, in our circuit, including myself, have been rather generous in compelling disclosure, so as to *channel* the inquiry. I believe that this method has been time-saving, * * *." (Yankwich, "Observations on Anti-Trust Procedures" (1950), 10 F. R. D. 165, 168; author's italics.)

The decision of the court below fails to recognize the policy of the Federal Rules of Criminal Procedure that, in the interest of simplicity and of expedition of trials, a liberal discretion should be given to the trial judge in regard to pre-trial disclosure in order to "channel the inquiry." Its history shows that Rule 17(c) was intended to grant such discretion to the district courts.

C. The History of Rule 17(c) Supports the Action of the District Court.

As shown on pp. 14, 18-25, *supra,* both the express language of Rule 17(c) and the general policies of the Criminal Rules authorized the district court's order. The history of the Rule likewise warrants the action of the trial judge. The final sentence of Rule 17(c), which authorizes district

courts to permit inspection of subpoenaed documents "prior to the trial," was explained as follows in the Advisory Committee's notes to the preliminary and second preliminary drafts of Rule 17(c):

> "The last sentence provides for a method by which the court may permit either side to inspect subpoenaed documents or objects under the supervision of the court. It is inserted in the *interests of fairness* and for the *purpose of preventing delay during the trial,* particularly in cases where numerous documents may have been subpoenaed." [Italics supplied.][15]

These are precisely the considerations which motivated the district court in directing Government counsel to obey the subpoena *duces tecum* (see quotation from the court's remarks, *supra,* pp. 20-21).

In an article on the Federal Rules of Criminal Procedure, Professor Dession, a member of the Advisory Committee and formerly a Special Assistant to the Attorney General in the Antitrust Division, explained Rule 17(c) as follows:[16]

> "With respect to subpoenas for the production of documents or objects—the *duces tecum*—subdivision (c) contains one new provision and otherwise restates the familiar practice. The new provision is this:
>
> > 'The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their pro-

15. Federal Rules of Criminal Procedure, Preliminary Draft (1943), pp. 107-108; Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), p. 99. Rule 17(c) was Rule 20(b) of the preliminary draft and was Rule 19(c) of the second preliminary draft. Rule 17(c) was virtually unchanged after publication of these notes, and they are therefore still pertinent, as the Government concedes (Br. in Opp. 14, note 7).

16. Dession, "The New Federal Rules of Criminal Procedure: II" (1947), 56 Yale L. J. 197, 221-222.

duction permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.'

"This provision invites an exception to the 'normal' practice in the handling of documents produced in response to a subpoena *duces tecum*. Normally, 'the books and other things called for would merely be brought into court at the time of the trial, let us say immediately before they are to be offered in evidence, * * *.' The party calling for the documents, as well as the court, would then have had no prior opportunity to examine them. This normal practice makes sense in cases of no more than average complexity which can in any event be tried in from one to five days. The common law rules of procedure and of evidence were, of course, developed out of experience with such cases. Given but a few relevant documents (perhaps a contract or a few letters), it is perfectly feasible to call for them and see them for the first time in open court—and for judicial process to absorb the delay while the party who served the subpoena studies the document to determine whether the producing party has complied, and *whether the document is to be used;* or while the court, if there is an objection to production of a document, studies it to see whether it is relevant, material and non-privileged. In federal practice, however, one must also envisage trials which involve thousands of documents and consume many months of trial. Most major antitrust proceedings are of this description, as are various classes of cases arising under other industry-regulation statutes.

"The only practicable solution, if such cases are to be tried before courts, is a subpoena practice which permits of a sifting in advance of trial of the documents actually to be offered in evidence. The court can hardly participate in the preliminary sifting, for the relevance and materiality of most such documents will be circumstantial, and under our system of adjudication the court is not supposed to know enough about the evidence before trial to have an informed

judgment on the circumstantial relevance and materiality of any given bit of proof. Such practical considerations led the district court in the recent *American Tobacco* anti-trust case to adopt the very practice since sanctioned by this Rule." [Italics supplied.]

The instant order is fully consistent with this authoritative explanation. It should be noted that the party who obtains the subpoena may study the subpoenaed document to ascertain "whether the document is to be used" (56 Yale L. J. at pp. 221-222). There is no requirement that the subpoenaed documents must be documents which will definitely be offered in evidence (see *infra*, pp. 46-49). In fact, in the *American Tobacco* case to which Professor Dession refers, before the promulgation of the Federal Rules of Criminal Procedure, through the use of subpoenas *duces tecum*, the Government inspected documents of the indicted defendants prior to the trial, regardless of whether such documents were to be offered in evidence. See *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 116 (C. A. 6), affirmed, 328 U. S. 781.

D. The Limitations Which the Government Proposes and the Court Below Adopted Conflict With the Plain Language of Rule 17(c) and Would Defeat Its Objectives.

Despite the affirmative grant of discretionary power to the district courts in Rule 17(c), the policies announced in Rule 2, and the history of Rule 17(c), the Court is asked to insert all of the limiting language of Rule 16 into the permissive language of Rule 17(c). Neither reason nor authority supports the request.

1. Rule 17(c) Contains Its Own Limitations.

It is urged that unless the limitations of Rule 16 are read into Rule 17(c), an "unlimited privilege" of pre-trial discovery would be permitted by Rule 17(c) (Br. in Opp.

11-12), and the court below held that otherwise "an almost unlimited right" of discovery would be created (R. 132). But Rule 17(c) is a discretionary rule and contains effective limitations. It is merely permissive and, in addition, authorizes the district court to "quash or modify * * * unreasonable or oppressive" subpoenas. The terms of Rule 17(c) grant a *restricted and limited privilege* to inspect all, or parts of, the subpoenaed documents, if the district court should decide in its discretion that such inspection is warranted. The fact that Rule 17(c) contains its own special safeguards, *differing from those in Rule 16*, refutes the argument that it was the intent of the draftsmen to impose the limitations of Rule 16 upon Rule 17(c).

2. Rule 16 Is Not a Limitation on Rule 17(c) Because Each Has a Separate and Distinct Function.

The Government's principal argument is "that the right of defendants in criminal proceedings to obtain access to documents and other papers in the custody of attorneys for the Government is limited to the rights granted to such defendants by Rule 16 of said Rules" (Br. in Opp. 6; see also pp. 9, 10, 11, 12, 15 and 16 thereof). The literal words and the history of Rule 17(c) refute this argument. The Government, therefore, resorts to the history of Rule 16 (Br. in Opp. 10, 19, 20) in an attempt to support its conclusion.

The process whereby Rule 16 was reduced from a nearly exact counterpart of Civil Rule 34 to its present form is also the basis of the inference by the court below that Rule 16 precludes pre-trial inspection by use of subpoenas *duces tecum* (R. 132).

The majority opinion below apparently finds the presence of Rule 16 in the body of the rules inconsistent with the contention of petitioners as to the discretionary privileges

granted to them under Rule 17(c). This is demonstrated by the statement (R. 132) therein that:

> "* * * it is difficult to believe that the framers of the rule intended to authorize the discovery and inspection of broad scope under Rule 17(c) pertaining to subpoena which was expressly prohibited by Rule 16 * * *."

Rule 16 does not, of course, "expressly prohibit" pre-trial inspection under Rule 17(c), and the court points to no words from Rule 16 to support that statement. This same supposed inconsistency, however, is seized upon by the Government (Br. in Opp. 11, 12).

Rule 17(c) is a provision the primary purpose of which is to implement the constitutional right of an accused person to have compulsory process to obtain witnesses in his favor, as guaranteed by the Sixth Amendment. The right to subpoena witnesses necessarily implies the right to subpoena documents. *United States* v. *Burr*, 25 Fed. Cas. No. 14692d (C. C. D. Va.) at p. 34. (See *infra*, p. 59.) Rule 17(c) is but a codification of the former subpoena *duces tecum* practice permitted under the common law and under Section 1651(a) of the current Judicial Code (see pp. 52-65, *infra*, and Appendix). Rule 17(c) makes that practice explicit.

G. Aaron Youngquist, formerly Attorney General of the State of Minnesota and Assistant Attorney General of the United States, and a member of the Advisory Committee of this Court, said in discussing Rule 17(c):

> "Furthermore, while normally under a subpoena the books and other things called for would merely be brought into court at the time of the trial, let us say immediately before they are to be offered in evidence, there is a provision in this rule that the court may, in the proper case, direct that they be brought into court in advance of the time that they are offered in evidence, so that they may then be inspected in advance, *for the*

purpose of course of enabling the party to see whether he can use it or whether he wants to use it." [Italics supplied.][17]

While Rule 17(c) was thus intended as a method of securing to defendants the right to have compulsory process in their favor, Rule 16 is, in its origin and in its effect, a limitation upon the powers of the prosecution rather than an affirmation of the rights of the accused.

One of the reasons for Rule 16 is described in a statement made by Judge Medalie at the Institute on Federal Rules of Criminal Procedure. Judge Medalie, a former United States Attorney for the Southern District of New York and a member of the Advisory Committee of this Court, said, in discussing Rule 16:

> "Now there is the discovery and inspection rule. I think all lawyers will agree—and even young prosecutors will agree—it is a wholesome rule. If the district attorney, or his post office inspectors, or agents in anti-trust cases, come into a person's place of business and with a subpoena take advantage of his terror, back up a truck or two and take all of his papers out and load them up, this rule would permit an inspection of these papers * * *."
>
> "Much of this developed because in the anti-trust prosecutions great business organizations would find themselves denuded of much of their papers and records and then want to have a look at them, and they would be met by a blank stare from the custodian of those books, papers, and records."[18]

Rule 16, according to this authoritative explanation, fills a need which arises from the crippling effect upon a defendant's business which results from the prosecutor's action in stripping the business of its operating records. The

17. Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), pp. 167-168. Fred E. Strine, then in charge of the Criminal Division of the Department of Justice, was one of the panel discussion leaders.

18. Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), p. 277.

effect is no less harmful and unjust where the seizure or subpoenaing of the records has been lawful than it is where there has been an illegal seizure of records. The remedy in the latter situation is an order for return of property and to suppress evidence under Criminal Rule 41(e). Rule 16 was designed to remedy the comparable injustice which often exists where the procurement of the records was lawful.[19]

Significantly, Rule 16 does not limit the defendant's privilege of inspecting his own documents to those which have been taken from him by seizure or process. This fortifies our conclusion, consistent with Judge Medalie's remarks, that the Rule is intended to operate as a restraint upon the prosecution by affording a remedy for the arbitrary retention of records needed to operate a defendant's business—a function much different from that of Rule 17(c).

Rule 16 also goes two steps farther. First, it permits a defendant to inspect his own seized or subpoenaed records, not only for reasons of business necessity, but also for the purpose of preparing his defense. This was the procedure applied in *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523 (E. D. Ill.). The reliance of the Advisory Committee upon the *Goedde* case is indicated in its Note to Rule 16 where, after citing the case, the Committee declares:

"The Rule is a restatement of this procedure."

As the trial judge who decided the *Goedde* case, Judge Lindley was well aware of the "procedure" of which Rule 16 "is a restatement" when he stated in his dissenting opinion herein (R. 139) that:

"Rule 16 provides for the production of certain documents. Rule 17(c) authorizes a subpoena *duces tecum*,

19. It is pertinent to note how long documents are sometimes held by the prosecution. In the instant case, the order impounding documents was dated September 17, 1947 (R. 110, 111) and is still in force.

—an age-old expedient for securing the production of documents * * *.

* * * * *

"* * * there is no conflict between the two rules * * *."

Finally, Rule 16 also permits a defendant to inspect certain other documents, not his own, the retention of which by the prosecutor imposes unreasonable obstacles to the preparation of his defense. The statement of Judge Medalie concerning Rule 16, which is quoted *supra* (p. 31), concludes:

> "So we have the rule that you can go to court and get an order directing that you can look at your own books, papers, and records, and maybe a little more, too, again counting on the fact that most judges are fair."'

By "a little more" Judge Medalie apparently referred to the documents *not* belonging to the defendants, which the prosecutor had "obtained from others by seizure or process." This feature of Rule 16 was inserted primarily to limit still another unfair advantage, gained by the prosecutor who obtains evidence which is important to the defendants, and thereby denies them an opportunity to obtain it themselves.

In this connection, the Advisory Committee's note to Rule 16 states:

> "In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process *on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution.*"[20] (Italics supplied.)

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20. This latter privilege is qualified in Rule 16 by the necessity of a showing that the items sought should be material to the preparation of the defense. Such a qualification was undoubtedly necessary so that records and documents of others might not be indiscriminately viewed by defendants for purposes other than the preparation of a proper defense. Rule 17(c) does not require such a limitation because it is separately limited by its provision in regard to a motion to quash or modify the subpoena.

Rule 16 thus curtails two kinds of abuses of the power of the prosecutor,—preventing the accused from continuing his business by denying him access to records essential to its operation, and foreclosing defendants from obtaining materials which would be useful in the preparation of their defense.

The necessity for affording such privileges to the defendant was commented upon by Judge Yankwich in his "Observations on Anti-Trust Procedure", 10 F. R. D. 165, 168, quoted at p. 25, *supra*, wherein he remarked that the Government expects the utmost cooperation from defendants, but that it is seldom generous in reciprocating.

In addition, Rule 16 assures defendants of relief during the entire pendency of the proceedings,[21] which otherwise would have been available to them only when the trial was closer at hand, through the subpoena process as restated in Rule 17(c), or as more generally preserved under Section 1651(a) of the Judicial Code.

Thus, it was not the intention of the Advisory Committee to limit all rights of discovery and inspection by the adoption of Rule 16. Rule 16 grants *additional privileges* to the defendant and in no way detracts from his otherwise broader privileges in obtaining such process as may be necessary to prepare and present his defense.

We submit that both Rule 16 and Rule 17(c) grant to

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21. The second preliminary draft of the Rules incorporated in Rule 18 [final Rule 16], after the words "indictment or information," the phrase "and after he has been arraigned." Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), p. 94. This qualification was omitted from the final draft. From this, we conclude that the framers intended the qualified rights granted by Rule 16 to exist throughout the pendency of the proceedings. *Per contra*, the provision of Rule 17(c) permitting pretrial inspection must, it would appear, have a reasonable relation to trial.

defendants certain protections and privileges which represent enlightened judicial thinking in accordance with the spirit of the rules as defined in Rule 2. Neither Rule is designed to exhaust a defendant's privileges or to limit and restrict the other. They complement each other.

That such was the true relation between a discovery order such as Rule 16 permits and a subpoena *duces tecum* for pre-trial inspection of relevant material was indicated by the Court of Appeals for the Second Circuit, even before adoption of the Rules, in *Weinberg* v. *United States*, 126 F. 2d 1004. In that criminal case, a petition for the return of certain property by the prosecutor had been denied, but the court of appeals reversed, stating (p. 1008):

> "Of course, the process of subpoena could have been employed to bring the evidence before the court, 28 U. S. C. A. § 377; *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 31 S. Ct. 676, 55 L. Ed. 873; an order to the prosecution's lawyer, an officer of the local court, is merely a more natural and direct way of achieving the same end under the Go-Bart case, supra. [*Go-Bart Importing Co.* v. *United States*, 282 U. S. 344.]"

There is further important evidence in the Advisory Committee's notes which shows that Rule 16 was not intended to supplant or restrict pre-trial use of subpoenas for production and inspection of documents. In drafting Rule 16, the Advisory Committee originally included in its notes a reference to *United States* v. *Burr*, 25 Fed. Cas. No. 14,692d, 14,694 (C. C. D. Va.), but after restricting the scope of the rule so that the type of material involved in the *Burr* case was no longer provided for, the reference was deleted.[22] It would hardly be argued that the Advisory Committee thereby sought to override Chief Justice Mar-

22. Compare the Advisory Committee's final Note to Rule 16 with Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 103; and Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), pp. 94-95.

shall's decision in the *Burr* case, particularly when one considers that the decision rested upon the Sixth Amendment and other fundamental considerations of fairness. The only logical inference is that the draftsmen of Rule 16 realized that a subpoena *duces tecum* was involved in the *Burr* case, and that it was out of place, therefore, to cite that case under the rule providing for discovery and inspection by motion and order. Their obvious intention was to codify the already liberal subpoena *duces tecum* practice in the subpoena *duces tecum* rule (Rule 17(c)).

3. The Only Issue as to the Scope of the Subpoena Is Whether It Should Have Been Limited to Documents Obtainable Under Rule 16.

The court below had before it only the very narrow issue whether it was proper for the instant subpoena to call for material which had been "obtained by Government counsel, in any manner other than by seizure or process." (R. 71), and which therefore could not have been obtained by an order under Rule 16. Any other question of the scope of the subpoena had been waived by the Government in the district court (R. 61, 62). Despite this fact, the Government now refers to the designation of the documents called for as a "dragnet" or "fishing expedition" (Br. in Opp. 14, 16). However, this point was not raised in the Government's motion to quash the subpoena (R. 72-73) or in the Statement of Points Relied Upon on Appeal (R. 103-104). Accordingly, the court of appeals refused to consider the form, or scope of designation, of documents in the subpoena, despite the Government's belated attempt to raise the question in its reply brief, and the Government is precluded from raising the point here. *United States* v. *Atkinson*, 297 U. S. 157; *Weade* v. *Dichmann, Wright & Pugh*, 337 U. S. 801; Robertson and Kirkham, "Jurisdiction of the Supreme Court of

the United States" (1936) § 389 (at pp. 781-782, 787), and cases cited.

The court below does, however, appear to have inadvertently departed from consideration of the effect of Rule 16 upon the subpoena power granted in Rule 17(c), since it observed (R. 132) that the action of the trial court created in Rule 17(c) "an almost unlimited right of discovery" and stated (R. 134) that Rule 17(c) "may not be converted into an unrestricted pre-trial discovery device." However, the holding of the court below is only that no documents beyond the reach of Rule 16, whether broadly or narrowly designated, may be inspected under Rule 17(c).

In any event, in *Brown* v. *United States*, 276 U. S. 134, 143, the Court held that subpoenas need only specify "with reasonable particularity the subjects to which the documents called for relate." As pointed out in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554, unless such a liberal rule is applied, one "would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the [party] * * * desiring the papers would probably rarely, if ever, have." Similarly, in *United States* v. *Burr*, 25 Fed. Cas. No. 14,694 (C. C. D. Va.), Chief Justice Marshall stated (at p. 191):

> "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? * * * When a paper is in the possession of one party, it is completely in his power, and is required by the other, very strong reasons must be given to justify its being withheld, if it have any relation to the case."

And, as this Court noted in *Hickman* v. *Taylor*, 329 U. S. 495, 507, when considering the civil discovery rules:

> "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring

> into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

These remarks apply even more plainly to criminal proceedings. See Berger and Krash, "Government Immunity from Discovery" (1950), 59 Yale L. J. 1451, 1453-54, 1456-60.

The issue as to the scope of the instant subpoena which was *not* waived by the Government in the trial court is the issue whether the subpoena could properly reach material in the prosecutor's custody although inspection of the same material under Rule 16 would not be permitted. If the Government is correct in its argument that no subpoena addressed to Government counsel under Rule 17(c) may call for documents not included within the discovery powers granted by Rule 16 (Br. in Opp. 6, 9, 10, 11, 12, 15, 16), no subpoena, however specific, could be issued for material obtained otherwise than by seizure or process and not obtained from or belonging to defendants. There is no correlation between the limitations of Rule 16 and the limitation now proposed by Government counsel to "particular identifiable objects of evidence" (Br. in Opp. 19-20). The Government's two arguments as to the proper limitations to be imposed upon the scope of Rule 17(c) are inconsistent, and the Government made its election between them when it waived all objections to the form of the subpoena in the trial court (see pp. 36-37, *supra*).

The limitations upon Rule 17(c) which are properly presented here by Government counsel are, as noted *infra* (p. 44), pertinent only to subpoenas addressed to the Government, because Rule 16 applies only to discovery against the Government.

The true objection to this subpoena is not to the source from which or the method by which the documents had been obtained; it is really to the fact that it was directed to an attorney for the Government. In essence, the Government's position is a direct descendant of the Crown's prerogative in ancient English common law, to conduct criminal trials as a game instead of as a serious search for the truth.[23] Such archaic notions have long since been abandoned in other forms of litigation; they have no proper place in contemporary administration of the criminal laws. Cf. *United States* v. *Coplon*, 185 F. 2d 629, 638 (C. A. 2). At bottom, the objection to the scope of the subpoena is thus a "privilege" argument. Indeed, in the district court the Government objected to the granting of this subpoena on the grounds that its description of the documents sought might include documents as to which the defense of "privilege" would be available. Thus, respondent Hotchkiss said in his statement refusing to comply with the subpoena (R. 86):

> "In addition, it is apparent, from the scope of designation of the aforesaid subpoena *duces tecum*, that it calls for the production of privileged documents, including, among others, documents which the Government *might* have secured from confidential and voluntary informants, and that the disclosure of such documents to defendants in criminal proceedings pursuant to subpoena issued under Rule 17(c) *would* be against public policy and would prevent and impede the Government in this and other criminal proceedings from securing from voluntary informants the benefits of their voluntary disclosure to the Government of information and documents relating to possible violations of the criminal statutes of the United States." (Italics supplied.)

It is submitted that the above contention provides the key to the argument advanced here by the Government.

23. See note 8, *supra*, p. 19.

Only because Government counsel consider themselves to be in some respects protected by the shield of public policy from the universal duty to divulge all relevant material to the courts to aid in the ascertainment of the truth or falsity of criminal charges do they place upon Rule 17(c) the narrow, strained, and altogether artificial interpretation which the court below endorses.

The rule of interpretation of Rule 17(c) for which the Government here prays would permit evasion of the Government's duty *to submit to the courts* the questions of privilege and public policy of protecting voluntary informants. By blocking all access to documents not obtained by seizure or process and not belonging to or obtained from defendants, on the ground that no Rule affords a procedure for obtaining them, the Government would effectively remove from the control of the courts the power to determine when and to what extent the privilege from discovery should attach.[24]

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24. Cf. *United States* v. *Cotton Valley Operators Committee*, 339 U. S. 940; *Marbury* v. *Madison*, 1 Cranch 137, 143-145, 166; *United States* ex rel. *Touhy* v. *Ragen*, 180 F. 2d 321 (C. A. 7) now pending here, No. 83, present Term; *United States* v. *Coplon*, 185 F. 2d 629, 638 (C. A. 2); *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2); *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2); *United States* v. *Ebeling*, 146 F. 2d 254, 258-259 (C. A. 2; dissenting opinion of Judge Frank); *United States* v. *Watkins*, 67 F. Supp. 556 (S. D. N. Y.); *Bank Line* v. *United States*, 76 F. Supp. 801 (S. D. N. Y.); *Sorrentino* v. *United States*, 163 F. 2d 627, 629 (C. A. 9); *Crosby* v. *Pacific SS Lines*, 133 F. 2d 470, 475 (C. A. 9); *United States* v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2); *Wilson* v. *United States*, 59 F. 2d 390 (C. A. 3); *United States* v. *General Motors Corporation*, 2 F. R. D. 528, 530 (N. D. Ill.); *O'Neill* v. *United States*, 79 F. Supp. 827 (E. D. Pa.); *Zimmerman* v. *Poindexter*, 74 F. Supp. 933, 934 (D. Hawaii); *Kentucky-Tennessee L. & P. Co.* v. *Nashville Coal Co.*, 55 F. Supp. 65 (W. D. Ky.); *United States* v. *Schine Chain Theatres*, 4 F. R. D. 109 (W. D. N. Y.); *United States* v. *American Solvents & Chemical Corporation*, 30 F. Supp. 107 (D. Del.); *Bowles* v. *Ackerman*, 4 F. R. D. 260 (S. D. N. Y.); *Walling* v. *Richmond Screw Anchor Co.*, 4 F. R. D. 265 (E. D. N. Y.); *Brewer* v. *Hassett*, 2 F. R. D. 222 (D. Mass.); *Fleming* v. *Bernardi*, 4 F. R. D. 270 (N. D. Ohio); cf. Taine, "Discovery of Trial Preparations in the Federal Courts" (1950), 50 Col. L. Rev. 1026, 1043-1044 and note 105.

The effect of this would not only be to protect all genuinely privileged documents from being subpoenaed and examined by the accused. It would also protect all documents from being subpoenaed which the Government had obtained either by covert means or by voluntary disclosure, whether or not they should properly remain undivulged. It would thus encourage Government's investigators to avoid seizure and process in obtaining evidence, and to resort to other, less overt, methods.

This case does not present the Court with the issue whether the documents described in the subpoena are privileged. The Government has at no time disclosed whether any of the documents which meet the description in the subpoena are, in its opinion, privileged. Neither has it described any of the documents being withheld from defendants, either openly or *in camera*, to the district court or the court below. In this connection, the Government never went beyond the Hotchkiss affidavit (cf. R. 130), which, as noted above, stated that a subpoena

> "calls for * * * among others, documents which the government *might* have secured from confidential and voluntary informants * * *" (R. 86). [Italics supplied.]

Moreover, Government counsel carefully avoided having recourse to the privilege argument in the court below, and it was not presented as a question in the petition for certiorari. The record affords no foundation for its determination.

4. A Subpoena under Rule 17(c) May Properly Be Addressed to an Attorney for the Government.

In holding that material which need not be produced under Rule 16 cannot be obtained under Rule 17(c), the court below in effect held that the instant subpoena could not properly be addressed to a prosecutor.

Neither the majority opinion nor the concurring opinion in the court of appeals mentioned the general policies which Rule 2 prescribes for interpretation of the whole system of the Criminal Rules. We submit that they failed to appreciate the destructive consequence upon the fair administration of criminal justice which, contrary to constitutional and common law principles, would result from prohibiting or imposing special restrictions on subpoenas *duces tecum* addressed to the prosecutor.

In the district court, the Government's main argument was that Rule 17(c) was inapplicable to the Government or its attorneys (R. 53-55, 94, 97). This point was abandoned in the Government's principal and reply briefs in the court below and in its brief in opposition here. At the oral argument below, Government counsel repeatedly conceded that Rule 17(c) applied to the Government (R. 134, note 1). Although Judge Major's concurring opinion holds that the word "person" in Rule 17(c) does not apply to the Government or its attorneys (R. 134, 136-137, 138), this highly technical construction has never been adopted by any of the courts which have considered Rule 17(c). This construction is refuted by the history of Rule 17(c), for the Advisory Committee's note on Rule 17(c) states that it is "substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure." Rule 45(b), which also uses the term "person," has been construed to include the Government within the meaning of that term. *Bowles* v. *Ackerman*, 4 F. R. D. 260 (S. D. N. Y.); *Zimmerman* v. *Poindexter*, 74 F. Supp. 933, 934 (D. Hawaii); cf. *United States* v.

Yellow Cab Co., 338 U. S. 338, 341-342; *United States* v. *General Motors Corp.*, 2 F. R. D. 528 (N. D. Ill.).[25]

Judge Duffy's opinion, after reviewing the facts, opens his discussion of the legal problem with the statement (R. 131):

> "It is readily apparent that Rule 16, Federal Rules of Criminal Procedure, is restricted in its scope. A defendant in a criminal case faces sharply defined limitations in securing access to documentary material in the hands of prosecuting attorneys of the federal government."

Judge Duffy's opinion continues with his description of the limitations found in Rule 16 and his summary of the stages by which the Advisory Committee developed Rule 16 from one draft to another until it reached its present form. Only after completing that survey does Judge Duffy first consider Rule 17(c). The conclusion reached is summarized in the following sentence of the opinion (R. 132):

> "It does not make sense to have created in one rule a privilege of discovery limited to documents and papers belonging to the defendant or taken from others by seizure or process and at the same time to create

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25. The Advisory Committee's note on Rule 45(b) states that it "broaden[s] U. S. C., Title 28, § 636 (Production of books and writings) to include all actions and to extend *to any person*" (Italics supplied). Section 636 (28 U. S. C., 1940 ed.) was held to apply to production against the United States (*Third National Bank & Trust Co.* v. *United States*, 53 F. 2d 599 (C. A. 6); *United States* v. *Youngs*, 28 Fed. Cas. No. 16783 (10 Benedict 264) (S. D. N. Y.); *United States* v. *Hutton*, 26 Fed. Cas. No. 15433 (10 Benedict 268) (S. D. N. Y.)).

In *United States* v. *Burr*, 25 Fed. Cas. No. 14694 (C. C. D. Va.), Chief Justice Marshall held that pre-trial subpoenas *duces tecum* in criminal cases could be directed to the Government. He stated (at p. 191) that "The prosecutor is the representative of the government, and the government acts as a party through the agency of the attorney, who directs and manages the prosecution on behalf of government. If there be a paper ... the possession of the executive, which is not of an official nature, he must stand, as respects that paper, in nearly the same situation with any other individual who possesses a paper which might be required for the defence."

in Rule 17(c) an almost unlimited right of discovery by use of the subpoena provisions."

This interpretation discriminates between subpoenas addressed to non-parties, to defendants, or to co-defendants and subpoenas addressed to the prosecutor.

Rule 17(c) could be invoked, for example, in the following four situations: (1) where defendants seek documents from the prosecutor; (2) where the prosecutor seeks documents from the defendants; (3) where defendants seek documents from witnesses who are not parties, and (4) where the prosecutor seeks documents from witnesses who are not parties. Judge Duffy reads certain limitations into Rule 17(c) but he derives them only from Rule 16. Rule 16 applies only to the first of the four situations described above. To limit Rule 17(c) by inserting therein the restrictions found in Rule 16 would have no limiting effect in any of the last three situations described. Thus, Judge Duffy's opinion in effect holds that Rule 17(c) does not authorize certain types of subpoenas against the Government even though *identical* subpoenas would be upheld if the Government used them against defendants,[26] or if either party

26. The Court may wish to take judicial notice of the fact that in 1950, long before trial, the Government in a related criminal case, *United States* v. *Bowman Dairy Company, et al.*, 48 CR 361 (N. D. Ill.), employed Rule 17(c) to obtain considerable documentary evidence from one of the corporate petitioners herein. Judge Major's concurring opinion would foreclose the Government, after indictments, from pre-trial inspection of documentary evidence in the possession of defendants, because he holds that Rule 17(c) may not be employed against parties (R. 135-136, 138). The petitioners believe that Rule 17(c), when correctly construed, also authorizes the Government to use it for pre-trial inspection of documents in the possession of a corporate defendant, or, subject to personal privileges, in the possession of an individual defendant. Cf. *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 116 (C. A. 6), affirmed, 328 U. S. 781. Even under the majority opinion below, the Government could not use Rule 17(c) for discovery purposes, because Rule 17(c) was construed as only providing "for the traditional type of trial subpoena" (R. 134).

used them against non-parties. This inequality of rights and duties would be one of the results of reading the qualifications of Rule 16 into Rule 17(c).

In addition to the plain language and the history of Rule 17(c), and the policy requirements of Rule 2, there are two further basic objections to the decision below that a subpoena under Rule 17(c) may not be addressed to an attorney for the Government unless limited to materials obtainable under Rule 16. First, heretofore in federal and state practice, subpoenas *duces tecum* have issued to compel prosecuting attorneys to produce materials which they have attempted to suppress or withhold (see pp. 52-65, *infra*, and Appendix. Production of such materials, if not privileged, has been required because it was important to the defendant and to the fair administration of justice irrespective of the source from which, or the means by which, the prosecutor had obtained them. No intention was expressed by those who drafted Rule 16 and Rule 17(c) to withdraw from defendants this important privilege which had long been theirs. Yet that would be the clear result if the decision below were allowed to stand. The second basic objection is that to adopt such a construction would curb the discretionary powers of the trial judge over the conduct of criminal proceedings to the extent that he would be prevented from minimizing the expense and delay of trials and from providing for the just and fair conduct of trials by requiring pre-trial inspection of crucial evidence.

5. Subpoenas Duces Tecum under Rule 17(c) Need Not Be Limited to Evidence Which Is to Be Used during the Trial.

Rule 17(c) and its history show that pre-trial inspection thereunder need not be limited "to evidentiary material which is to be offered at the trial by the party subpoenaeing it" (Br. in Opp. 13, 15-16). The opinions below do not discuss that point, for the Government first raised it here. Rule 17(c) provides for production and inspection "*prior to the trial or* prior to the time when they are to be offered in evidence" (italics supplied). The Government apparently infers from the phrase "when they are to be offered in evidence" that only documents which are to be offered in evidence may be inspected before the trial. This construction ignores the italicized clause above, including the disjunctive "or." Both the phrase "prior to the trial" and the word "or" establish a *time* standard; neither purports to limit the type of documents which may be inspected. The "books, papers, documents or objects designated in the subpoena" may be ordered produced for inspection either before the trial starts or after the trial has started.

Moreover, the construction which the Government urges would establish an impracticable standard for determining when a subpoena is proper. It would be almost impossible to limit the scope of a subpoena, even in a very simple case, to documents which will actually be introduced during the trial. Attorneys seldom can be sure that an item of evidence will be introduced until the very moment when its introduction is appropriate. A ruling of the court, a change in the direction of the opponent's strategy, an unexpected bit of testimony, or a number of other unpredictable factors may determine

whether particular items of evidence will be used. As Chief Justice Marshall stated in *United States* v. *Burr*, 25 Fed. Cas. No. 14694 (C. C. D. Va.), at pp. 191-192:

> "If the executive possess a paper which is really believed by the accused to be material to his defence, ought it to be withheld? The question will recur, is it really material to his defence? * * * *Until the course of the prosecution shall be fully developed, it may not be in the power of the accused to make a more positive averment. The importance of the letter to the defence, may depend on the testimony adduced by the prosecutor.*" [Italics supplied.]

He subsequently added (*ibid.*):

> "As to the use to be made of the letter, it is impossible that either the court or the attorney can know in what manner it is intended to be used."

It has recently been judicially noted that Rule 17(c) embodies the soundness of Chief Justice Marshall's ruling that a party is entitled to process of the court in obtaining any documents "which *may* be material" (court's italics). *Kelly* v. *United States*, 73 A. 2d 232, 234 (Mun. C. A. D. C., 1950). We know of no authoritative doctrine which would support the limitation of subpoena rights to documents actually to be introduced, or which would require the introduction of all documents subpoenaed. In fact, in *People* v. *Becker*, 210 N. Y. 274 (1914), one of the grounds for reversal and remandment for a new trial was the trial court's refusal to order the prosecutor to produce certain documents (described as "commissions") for defendant's inspection during the trial "unless counsel would agree to read the commissions in evidence" (210 N. Y. at p. 297). The same objections apply even more strongly to a requirement that documents subpoenaed before the trial

be offered. *State* v. *Bunk*, 63 A. 2d 842, 843-844 (Cy. Ct. N. J., 1949).[27]

Any subpoena *duces tecum* is in some respects a discovery mechanism, in that it brings in material which may or may not be introduced as evidence, depending upon its relation to the particular issues as they arise during the trial. Moreover, a trial court will ordinarily delay proceedings in progress sufficiently to permit parties and attorneys to inspect documents produced during trial in response to a subpoena *duces tecum*. Such cases as the instant one involve highly complex issues of fact and a large volume of documentary evidence and therefore require greater latitude in pretrial inspection than the usual case. (See notes 13, 14 and 16, *supra*, pp. 24, 26.)

Moreover, there are other important policy reasons for rejecting the Government's narrow view. Its adoption would prevent an accused from obtaining non-evidentiary material which might lead to exculpatory evidentiary material.[28] Such a construction would also permit a prosecutor to decide what is evidentiary and thus to produce for inspection only those documents which he might wish to disclose. Furthermore, it "presupposes an accurate

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27. It has frequently been held that the Government is under no obligation to call all of the witnesses which it subpoenas, and it would certainly follow from this that a party is under no obligation to offer in evidence all of the documents which it subpoenas. See *Jordan* v. *Bondy*, 114 F. (2d) 599, 604, note 3 (C. A. D. C.).

28. The Federal Rules of Civil Procedure permit the inspection of "relevant" documents, and it is not ground for objection that the documents would be inadmissible at the trial if they might lead to the discovery of admissible evidence. See Rules 34 and 26(b) of the Federal Rules of Civil Procedure. Moreover, the second draft of Rule 16 (then Rule 18) of the Criminal Rules required that the documents constitute "evidence in the proceeding", but this confining qualification was omitted in the final version of Rule 16. See Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), p. 94.

knowledge of such papers [in the prosecutor's possession], which the [party] * * * desiring the papers would probably rarely, if ever, have." *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554. Finally, the history of Rule 17(c) shows that it was not restricted to evidentiary material, for as pointed out by G. Aaron Youngquist, a member of this Court's Advisory Committee, the pre-trial feature of Rule 17(c) was to enable the subpoenaing party "to see whether he can use it [the subpoenaed material] or whether he wants to use it."[29]

6. No Basis Exists for Limiting Subpoenas Duces Tecum Under Rule 17(c) to Subpoenas Containing Ad Testificandum Clauses.

The Government apparently asserts (Br. in Opp. 12-13) that a command to produce documents under Rule 17(c) may only be a part of a subpoena to give testimony under Rule 17(a) and Judge Major took this position in his concurring opinion below (R. 135). This would mean that Rule 17(c) only permits a *duces tecum* clause to be used when it is added to an *ad testificandum* subpoena. The analysis is incorrect. It is well recognized that a subpoena may contain either an *ad testificandum* clause or a *duces tecum* clause, or both. The lack of an *ad testificandum* clause does not invalidate a subpoena *duces tecum*. *Wilson* v. *United States*, 221 U. S. 361, 372-374; *Essgee Company* v. *United States*, 262 U. S. 151, 157. Moreover, the Advisory Committee's notes to the preliminary and second preliminary drafts of Rule 17(c) point out that under Rule 17(c) "The production of books, papers, and documents may be required independently of testimony".[30]

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29. See Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), p. 168.

30. Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 107; Federal Rules of Criminal Procedure, Second Preliminary Draft (1943), p. 99. These notes are applicable to the final draft of Rule 17(c). See note 15, *supra*, p. 26.

See also the quotation from the *Burr* case at p. 59, *infra*.

II.

THE DISTRICT COURT'S INSPECTION ORDER IS BASED ON AMPLE PRECEDENT.

The court below did not concede, as does the Government (Br. in Opp. 19), that there is any common law privilege of addressing a subpoena *duces tecum* to a prosecuting attorney for production of documents. The opinion below asserts (R. 131):

> "It had been stated as a recognized rule of law that at common law a defendant had no right of discovery in criminal cases."

The opinion then interprets both Rule 16 and Rule 17(c) strictly, as if in derogation of common law. The opinion states (R. 134) that "Rule 17(c) provides for the traditional type of trial subpoena", evidently referring to the common law by use of the word "traditional." But if Rule 17(c) provides only for "the traditional type of *trial* subpoena", the Government would even lack specific authority to obtain documents for use in grand jury proceedings.

The opinion of the court below does not consider whether "the traditional type of trial subpoena" could be directed to a prosecuting attorney, or whether, if it could, it was "traditionally" limited in its allowable scope to documents which had been obtained from or had belonged to the defendant or had been obtained from others by seizure or process. The Government had conceded that the "traditional" trial subpoena could be addressed to the prosecutor, and was not limited to documents in those precise categories. The Government had merely recognized the valid common law precedents for the use of a subpoena to require the prosecutor to produce prior to trial documents outside of the confining limitations of Rule 16. However,

Judge Major's concurring opinion treats this recognition as an "ill-conceived admission" (R. 134, note 1). Judge Duffy overlooks the fact that the "traditional" subpoena *duces tecum* gave broader rights than does Rule 16. To interpret and apply Rule 17(c), the pertinent background is the common law, including the "traditional" as well as the statutory history of subpoenas *duces tecum*, rather than the history of Rule 16.

First, in its reply brief in the court of appeals, then in its oral argument there, and now in its brief in opposition, the Government has made an attempt to distinguish the instant case from the common law cases cited by petitioners. (See pp. 52-65 *infra*, and the Appendix.) The basis for the distinction cannot be that this subpoena is addressed to the prosecutor, because many of those were too. It cannot be that the documents sought by the instant subpoena were not obtained from or belonging to defendants or were not obtained from others by seizure or process. That standard first was developed by the draftsmen of Rule 16, and is not applied by the common law cases. The position which the Government now takes is that the common law cases involved "particular identifiable objects of evidence" (Br. in Opp. 19-20), whereas the instant subpoena is described as a "dragnet" or "fishing expedition" (Br. in Opp. 14, 16).

The majority opinion below holds that any form of pretrial inspection by defendants of documentary materials in the possession of the prosecution was a "startling innovation" (R. 131).[31]

31. The opinion relied (R. 131) on a statement by Dean Wigmore that "At common law no right of inspection of documents before trial was conceded to the accused" (6 Wigmore on Evidence (3rd ed., 1940) § 1859*g*). Petitioners do not urge that they have a right of inspection under Rule 17(c) but merely a privilege of inspection when, as here, the district court adjudges such an inspection to be warranted. Moreover, Wigmore's statement was referring to the early English common law, for he relied

The Government likewise relies on a supposed "lack of precedent in favor of pre-trial" inspection in criminal cases (Br. in Opp. 19). However, the district court's inspection order is supported by numerous precedents before and after the promulgation of the Federal Rules of Criminal Procedure. In fact, "most courts hold that they have the power, either inherently or by the application of, or by analogy to, the power they have by statute in civil causes, to order an inspection by accused before trial of documents or exhibits in the state's possession" (23 C. J. S. § 955).

A. The American Common Law Has Traditionally Authorized Trial Courts to Compel Prosecutors to Produce Evidence for Inspection by an Accused.

It is true that in a 1792 King's Bench decision, it was decided that pre-trial inspection of documents in criminal cases was not permissible at common law in England. *Rex* v. *Holland*, 4 T. R. 690, 100 Eng. Rep. 1248. However, within fifty years the English rule was liberalized.[32] In upholding

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solely on *Rex* v. *Holland*, 4 T. R. 690, 100 Eng. Rep. 1248 (1792) and *Commonwealth* v. *Jordan*, 207 Mass. 259 (1911). The *Holland* case no longer represents the English view (see pp. 52-53, *infra*, and Wigmore, *op. cit.*, § 1850), and the *Jordan* case held that it was within the discretion of the trial court to grant or refuse a motion to furnish the defendant, accused of murder, with a report of the autopsy on the victim (207 Mass. at pp. 264-265). Wigmore states that "considerations of fairness * * * call also for conceding the opportunity of inspection of documents" by an accused; he is highly critical of the early English rule (Wigmore, *op. cit.*, § 1859*g*; see also §§ 1845, 1850, 1859, 1863; 2 Bishop, New Criminal Procedure (2d ed., 1913) pp. 771-772).

32. *Rex* v. *Harrie*, 6 Carr. & Payne, 105, 172 Eng. Rep. 1165 (1833); *Reg.* v. *Spry*, 3 Cox C. C. 221 (1848); cf. *Attorney-General* v. *Newcastle-upon-Tyne Corporation*, [1897] 2 Q. B. 384, 395. In *Rex* v. *Gee*, [1936] 2 K. B. 442, convictions were quashed because, *inter alia*, the defendants were not furnished, prior to trial, with copies of the prepared typewritten statement used by the chief constable in examining them before the committing justices.

the claim of executive privilege in a recent civil case, the House of Lords recognized that the rule might be different in criminal cases. Thus, Viscount Simon stated as follows in *Duncan* v. *Cammell, Laird & Co., Ltd.* [1942], A. C. 624, 633-634:

> "The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same."

The Lord Chancellor explained the English common law rule as follows (at page 633):

> "Where the Crown is a party to a suit, therefore, discovery of documents cannot be demanded from it as a right, though in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made."

Moreover, "the modern [pre-trial] system in England is that an accused is not only permitted to see his confession, but the bulk of all of the evidence produced against him * * * without apparently producing any of the dire results expected or anticipated * * *." *State* v. *Haas*, 18 Md. 63, 71, 72 (1947).[33] Indeed, as explained by former Governor Whitman:

> "All of the evidence in the possession of the Crown is in the possession of the counsel for the defendant. He knows all that the Crown knows. He has all the

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The court remarked that "Before [the Act of] 1848 * * * it was not possible for a prisoner to obtain a copy of the depositions before trial" (2 K. B. at p. 445).

33. In the *Haas* case, the Court of Appeals of Maryland stated (188 Md. at p. 76):

> "We are not impressed by the fear of the prosecuting attorneys that the exercise of such [pre-trial inspection] discretion will change the whole practice of criminal law in this State, or will make the securing of proper convictions more difficult to obtain. It has not apparently had that effect elsewhere and we see no reason why it should have it here."

evidence in his possession before the witness goes on the stand. He has all the evidence that can be presented in that court at the trial before the trial begins."[34]

The American common law cases do not adhere to the early English view. In the leading case, *United States* v. *Burr*, 25 Fed. Cas. No. 14692d (C. C. D. Va.), Chief Justice Marshall pointed out that by necessary implication from the Sixth Amendment's guarantee of an accused person's right "to have compulsory process for obtaining witnesses in his favor," an accused was entitled to a subpoena *duces tecum* to obtain pre-trial inspection of documents that might be "material in the defence" (at pp. 33-35).

Even before adoption of the United States Constitution, courts of the American states had apparently departed from the concept of royal prerogative which, in the early English common law, had barred defendants' access to the Crown's evidence until the moment such evidence was introduced during the trial. Those early decisions of the State courts were referred to by Chief Justice Marshall (see 25 Fed. Cas. at p. 34) when he honored Aaron Burr's right to subpoena from the President of the United States, for pre-trial inspection,[35] certain letters deemed by Burr to be essential to his defense. In deciding that a subpoena

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34. Whitman, "The Administration of the Criminal Law," V New York City Bar Ass'n Lectures on Legal Topics (1928), p. 424. This statement appears in 6 Wigmore on Evidence (3rd ed., 1940) § 1850, pp. 394-395. Mr. Whitman had been District Attorney of New York County.

35. In *United States* v. *Burr*, 25 Fed. Cas. No. 14692d (C. C. D. Va.) Chief Justice Marshall held that subpoenas *duces tecum* may properly be issued prior to trial in criminal cases. He stated (at p. 33): "General principles, then, and general practice are in favor of the right of every accused person, as soon as his case is in court, to prepare for his defence, and to receive the aid of the processes of the court to compel the attendance of his witnesses."

duces tecum should be issued, the Chief Justice stated (25 Fed. Cas. at pp. 35, 38):

> "* * * it would seem to reduce his means of defence within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material. * * * The court would not lend its aid to motions obviously designed to manifest disrespect to the government; but the court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defence. These observations are made to show the nature of the discretion which may be exercised.
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> * * * * *
>
> "It is believed that such a subpoena, as is asked, ought to issue, if there exist any reason for supposing that the testimony may be material * * *."

While the issue here arises under Rule 17(c) of the Federal Rules of Criminal Procedure, it involves the same basic principles of constitutional law which were applied in the cases of the early American period. In the interim, there have been innumerable occasions when courts in criminal cases have recognized that justice required them to permit defendants to have access before trial to evidence which the prosecutor attempted to withhold, and where appellate courts have held that the matter of pre-trial inspection rests in the judicial discretion of trial courts.[36]

36. Federal and territorial cases permitting access to the prosecutor's evidence include *United States* v. *Burr*, 25 Fed. Cas. No. 14,692d (C. C. D. Va.), at pp. 34-35, 37, 38; *United States* v. *B. Goedde & Co.*, 40 F. Supp. 53, 534 (E. D. Ill.); *United States* v. *Warren*, 53 F. Supp. 435, 436 (D. Conn.); *United States* v. *Rich*, 6 Alaska 670 (1922); see also *Edwards* v. *United States*, 312 U. S. 473, 481; *United States* v. *Coplon*, 185 F. 2d 629, 637-638 (C. A. 2); *Shores* v. *United States*, 174 F. 838, 844-845 (C. A. 8); *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2); *United States* v. *Dilliard*, 101 F. 2d 829, 837 (C. A. 2); *Asgill* v. *United States*, 60 F. 2d 776, 778-779 (C. A. 4); *Weinberg* v. *United States*, 126 F. 2d 1004 (C. A. 2); *Boehm* v. *United States*, 123 F. 2d 791, 807-808 (C. A. 8).

In *Edwards* v. *United States*, 312 U. S. 473, the trial court had overruled Edwards' motion filed before the trial to compel the Government to produce a transcript of his testimony before the Securities and Exchange Commission, although he asserted that production of it was necessary to prove that the prosecution was based in part upon sworn testimony which he had given under compulsion

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For state cases, see *Parsons* v. *State*, 251 Ala. 467, 476-477 (1948); *State* v. *Superior Court*, 39 Ariz. 242, 249-250 (1931); *Jones* v. *State*, 213 Ark. 863, 866 (1948); *Massie* v. *People*, 82 Colo. 205 (1927); *Daly* v. *Dimock*, 55 Conn. 579 (1887); *Padgett* v. *State*, 64 Fla. 389, 395-396 (1912); *State* v. *Burris*, 198 Ia. 1156, 1162 (1924); *People* v. *Gerold*, 265 Ill. 448, 469-471 (1914); *Trustees of Schools* v. *American Surety Co.*, 307 Ill. App. 398, 414 (1940); *Weer* v. *State*, 219 Ind. 217 (1941); *State* v. *Howland*, 100 Kan. 181, 185 (1917); *State* v. *Hinkley*, 81 Kan. 838, 846-849 (1910); *Wendling* v. *Commonwealth*, 143 Ky. 587 (1911); *State* v. *Dorsey*, 207 La. 928, 964-966 (1945); *State* v. *Lowery*, 160 La. 811 (1926); *State* v. *Bramhall*, 134 La. 1 (1913); *State* v. *Haas*, 188 Md. 63, 70-76 (1947); *Commonwealth* v. *Jordan*, 207 Mass. 259, 264-265 (1911); *Commonwealth* v. *Noxon*, 319 Mass. 495, 535 (1946); *State* v. *Naething*, 318 Mo. 531, 539-540 (1927); *State* v. *Tippett*, 317 Mo. 319, 325-327 (1927); *Cramer* v. *State*, 145 Neb. 88, 94-96 (1944); *Hameyer* v. *State*, 148 Neb. 798 (1947); *Matter of Hughes* v. *Kings County Court*, 181 N. Y. Misc. 668, 672-673 (1943); *People* v. *Gatti*, 167 N. Y. Misc. 545 (1938); *Matter of Attorney General of United States*, 160 N. Y. Misc. 533 (1936); *People* v. *Rogas*, 158 N. Y. Misc. 567 (1936); *People* v. *Wargo*, 149 N. Y. Misc. 461, 463-464 (1933); *People* v. *Kresel*, 142 N. Y. Misc. 88 (1931); *People* v. *Radeloff*, 140 N. Y. Misc. 690 (1931); *People* v. *Bellows*, 1 How. Pr. N. S. 1849 (N. Y. O. & T., 1884); *State* v. *Cala*, 35 N. E. 2d 758, 760-761 (Ohio Ct. of Apps. 1940); *State* v. *Circuit Court of Minnehaha County*, 60 S. D. 115, 117-120 (1932); *Jenkins* v. *State*, 45 Tex. Cr. R. 173, 176 (1903); *State* v. *Payne*, 25 Wash. 2d 407 (1946); *State* v. *Clark*, 21 Wash. 2d 774, 778 (1944); *State* v. *Morrison*, 175 Wash. 656, 658 (1933); see also Note, 7 Fordham L. Rev. 449 (1938).

For cases dealing with inspection during trial see, *e. g.*, *State* v. *Guagliardo, et al.*, 146 La. 949 (1920); *People* v. *Buzan*, 351 Ill. 610, 618 (1933); *State* v. *Murphy*, 154 La. 190, 203 (1923); *Sprinkle* v. *State*, 137 Miss. 731, 732-733 (1925); *People* v. *Becker*, 210 N. Y. 274 (1914); *People* v. *Schainuck*, 286 N. Y. 161 (1941); *People* v. *Walsh*, 262 N. Y. 140, 149-150 (1933); *People* v. *Miller*, 257 N. Y. 54, 57, 58-59 (1931); *People* v. *Jackson*, 182 N. Y. 66, 81-82 (1905); *Application of Heller*, 184 N. Y. Misc. 75 (1945); *Coloniger* v. *State*, 91 Tex. Cr. R. 143, 146 (1922); *Mohler* v. *Commonwealth*, 132 Va. 713, 720 (1922).

of subpoenas *duces tecum* after claiming immunity. Edwards had entered a plea in bar, based upon the applicable immunity statute (15 U. S. C. § 77v (c)).

This Court held (p. 481) that the transcript should have been produced, or at least that the trial court should have exercised its discretion to issue an order to show cause why all or a part of the transcript should not be produced. The constitutional privilege against self-incrimination was basic to the inspection issue in the *Edwards* case (312 U. S. at pp. 475-477, 480-482).

If the *Edwards* case arose today, Rule 16 would not permit Edwards to obtain the transcript because it was not obtained from him and did not belong to him, and the prosecutor had received it voluntarily from the S. E. C., rather than by seizure or process. Moreover, the decision in the instant case, requiring that Rule 17(c) be confined to the scope of Rule 16, would prevent the district court from issuing a subpoena *duces tecum* to compel production of the transcript.

The *Edwards* case was followed in *Boehm* v. *United States*, 123 F. 2d 791 (C. A. 8), where the court stated (pp. 807-808):

> "Whenever it is timely presented to the court by a defendant in a criminal case that the transcripts of testimony of government witnesses against him given before investigators contain evidence material to his defense at the trial, and demand is made therefor, *the court should issue process for the production thereof* and should examine the same and should make its rulings as to admissibility or use in the trial of any part of the whole matter in the light of the transcripts before the court. In making such rulings the court is bound to exercise sound judicial discretion to accord the defendant the fair trial to which he is entitled and at the same time to confine the procedure to consideration of competent, relevant and material

evidence. In failing to adhere to that course in this case, and in refusing absolutely to take any steps to compel production of the demanded transcripts, the trial court was in error; * * *." [Italics supplied.]

In the *Boehm* case, too, Rule 16 would not have applied, since the material sought consisted of narrative statements made by government witnesses to government investigators, and therefore Rule 17(c) would not apply either, if interpreted as containing the limitations of Rule 16, as it was by the court below.

The limitations which the court below would impose upon the common law powers of the trial judge are not founded upon common law precedents.[37]

The common law powers of trial courts to compel disclosure of evidence to defendants were not confined to witnesses other than attorneys for the State. In virtually all of the cases in the Appendix hereto defendants were permitted to examine documents or other relevant materials which were in the possession or control of the attorney for the State, or the trial court's discretionary power to permit such inspection was recognized.

Nor were the trial court's powers to compel the prosecution to disclose relevant material confined to material belonging to defendants, obtained from defendants, or obtained from others by seizure or process. Cases appearing in the Appendix, in addition to the *Burr, Edwards,* and *Boehm* cases, went outside of those categories. In fact, the sole basis for that limitation appears to be the language of Rule 16, and that language bears no relation whatever to the common law authorities.

It is reiterated again and again in the common law cases that a court's power to compel disclosure of material by

37. The sole possible exception is the Government's contention that material to be inspected before the trial must be material which is to be introduced during the trial. That proposed limitation, however, is completely inconsistent with the plain language and history of Rule 17(c) and the general policy of the Criminal Rules as shown, *supra*, pp. 46 to 49.

the prosecution is discretionary, and is inherent in the nature and function of the court, being exercisable as a matter of judicial grace. As was said in *United States v. Burr*, 25 Fed. Cas. No. 14,692d (C. C. D. Va.) (at p. 32).

> "The genius and character of our laws and usages are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial."

Three constitutional bases underlie the legal principles upon which courts have proceeded in granting such discovery rights to the accused. The first and more general is the requirement of the Sixth Amendment that the accused be "informed of the nature and cause of the accusation." The second is the provision in the Sixth Amendment that the accused shall "have compulsory process for obtaining witnesses in his favor." As Chief Justice Marshall said in the *Burr* case (25 Fed. Cas. No. 14,692d (C. C. D. Va.) at pp. 34-35):

> "A subpoena *duces tecum*, then, may issue to any person to whom an ordinary subpoena may issue. * * * *This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence.* The literal distinction which exists between the cases is too much attenuated to be countenanced in the tribunals of a just and humane nation. If, then, the subpoena be issued without inquiry into the manner of its application, it would seem to trench on the privileges which the constitution extends to the accused; it would seem to reduce his means of defence within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material." [Italics supplied.]

The third constitutional basis for Rule 17(c) is the due process clauses of the Fifth and Fourteenth Amendments.

Cases requiring pre-trial inspection of material in the prosecutor's possession on constitutional grounds appear at pp. 2, 7 and 11 of the Appendix hereto.

As shown, the Constitution and the American common law furnish the origin of Rule 17(c). Section 14 of the Judiciary Act of 1789 (now 28 U. S. C. 1651(a))[38] is another precedent for Rule 17(c) and is an additional authority for the district court's order. That Section conferred upon the federal courts the power to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the practice and usages of law. It was construed in *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 609, as comprehending "the authority to issue subpoenas *duces tecum*, for 'the right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of law.'" This provision is applicable to subpoenas *duces tecum* in criminal proceedings (*Weinberg* v. *United States*, 126 F. 2d 1004, 1008 (C. A. 2)) and empowers a federal court "to issue subpoenas *duces tecum* for purposes of pre-trial discovery," especially where, as here, the issues are "complicated or extensive" so that "pre-trial discovery is necessary to a prompt and satisfactory trial of the issues." *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 120 F. 2d 126, 127 (C. A. 1).[39] Thus the American common law, the Fifth

38. 28 U. S. C. § 1651(a) provides as follows: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

39. The *Bethlehem* case apparently involved a civil contempt, and the court referred to the Federal Rules of Civil Procedure by way of analogy. However, the above-quoted language was not an interpretation of the Civil Rules, but of Section 377 of the Judicial Code (28 U. S. C. 1651 (a)), which applies to criminal cases as well as to civil actions. *United States* v. *Smith*, 331 U. S. 469; *Ex parte United States*, 287 U. S. 241; *United States* v. *Mayer*, 235 U. S. 55; *Weinberg* v. *United States*, 126 F. 2d 1004, 1008 (C. A. 2).

and Sixth Amendments, and Section 1651 (a) of the new Judicial Code, as well as Rule 17(c), empowered the district court to enter the instant order.

In spite of the common law authorities, the fundamental principles embodied in the Fifth and Sixth Amendments, and 28 U. S. C. 1651(a), Government counsel have argued that the subpoena *duces tecum* powers granted to the federal district courts by Rule 17(c) must be construed strictly by reading into the Rule the restrictions found in Rule 16. That argument can be summed up as a contention that the confined and crippled remnants of Rule 17(c), containing the qualifications of Rule 16, specify no procedure at all for use of subpoenas *duces tecum* for discovery against the Government prosecutor in a situation such as this.

If such is to be the fate of Rule 17(c), however, even this would not result in invalidation of the subpoena involved in this case. On the contrary, Rule 57(b) of the Federal Rules of Criminal Procedure expressly provides that matters as to which the Rules are silent shall be proceeded with "in any *lawful* manner *not inconsistent with these rules* or with any applicable statute". The subpoena in this case is *lawful* at common law, under 28 U. S. C. 1651(a), and under the Fifth and Sixth Amendments. Rule 16, as noted above (pp. 29-36), *is not inconsistent* with the common law, but is merely supplementary thereto in providing a restraint upon the prosecution, which complements the benefits to the accused provided by Rule 17(c). Moreover, the limitations of Rule 16 are not constitutional if they mark absolute limits to, and thereby deprive defendants in criminal cases of their rights under, the Fifth and Sixth Amendments. Cf. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401. Hence, if Rule 17(c) is to be interpreted as containing the limitations found in

Rule 16,[40] the instant subpoena should be upheld as proceeding in a "lawful manner" with regard to a matter as to which "no procedure is otherwise specifically prescribed by rule," within Rule 5. (b).

The American common law cases permitting inspection were sometimes complementary to the indictment and bill of particulars. In this case, the district court had previously denied petitioners' motions to dismiss the indictment as excessively vague and indefinite (R. 117). In addition the court had, except to a very limited extent, denied the defendants' motions for a bill of particulars at the very time that it denied the Government's motion to quash this subpoena (R. 75). Thus, the instant order, just as in some of the foregoing American common law cases,[41] was designed to insure that defendants be properly informed of the factual issues.

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40. The court below held that Rule 16 "expressly prohibited" discovery and inspection of broad scope (R. 132). This is incorrect; the Rule merely establishes express limits to its own application. It certainly does not "expressly prohibit" use of other rules, statutes, or common law procedures for discovery purposes.

41. The Government evidently relies upon *People* ex rel. *Lemon* v. *Supreme Court*, 245 N. Y. 24 (1927) (Br. in Opp. 18, note 12). However, Chief Judge Cardozo there stated (at pp. 29, 32, 33):

> "No precedent can be found even in civil causes for compelling disclosure, in advance of the trial, of the office notes or memoranda prepared by an attorney after consultation with his witnesses, and summarizing his understanding of the testimony that is likely or expected.
>
> * * * * *
>
> "The decision of this case does not require us to affirm or deny the existence of an inherent power in courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice.
>
> * * * * *
>
> "We leave the question open, for if the power exists at all this case is not within it. The most that can be argued with any show of reason in behalf of the defendant is that the remedy of inspection in civil cases is to be applied *in consimili casu* to criminal prosecutions. The power in criminal prosecutions may not improbably be less."

It is interesting to note the observations of Judge Medina concerning a similar point in a civil antitrust proceeding:

> "I am going to find some way, whether by these interrogatories or some equivalent process, of advising the Government at some appropriate time to disclose to these defendants, to each of them, just exactly what they are charged with. * * * There is no use of our fussing about as to whether we call it a bill of particulars or call it answers to interrogatories.
>
> * * * * * *
>
> "What I am concerned about is seeing to it that when these defendants go into this trial they will know exactly what they have to meet factually, and that is what I think they are entitled to in some way or another" (Hearings in *United States* v. *Henry S. Morgan*, No. 43-757 (S. D. N. Y., October 30, 1947), as quoted in McAllister "The Big Case: Procedural Problems in Antitrust Litigation" (1950), 64 Harv. L. Rev. 27, 31-32).

These observations apply *a fortiori* to a criminal proceeding in view of the guarantees of the Fifth and Sixth Amendments. As Judge Learned Hand pointed out in *United States* v. *Coplon*, 185 F. 2d 629, 637-638 (C. A. 2):

> "If the prosecution had not had the records and had been obliged to rely upon the testimony of the 'monitors,' it would certainly have been constitutionally necessary under the Sixth Amendment to ex-

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In a subsequent case, Judge Cardozo explained that pre-trial inspection was denied in the *Lemon* case because the documents were "the private memoranda of the prosecuting officer" (*People* v. *Müller*, 257 N. Y. 54, 59 (1931)), comparable to the work product of an attorney, involved in *Hickman* v. *Taylor*, 329 U. S. 495, and expressly excluded from the instant subpoena. See also the New York decisions cited in note 36, *supra*, pp. 55-56. Wigmore criticizes the *Lemon* case as "accepting impotently the view that the Judiciary must wait on the Legislative for doing justice in such cases." 6 Wigmore on Evidence (3rd ed., 1940) § 1850, p. 395.

amine them openly and in court; * * * Unless therefore there is some excuse which will toll this constitutional privilege it appears irrefragably demonstrable that the suppressed records were incompetent.

"* * * the refusal to allow the defence to see them was, as we have said, a denial of their constitutional right, and we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf. *Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens.* All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. *But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.*"[42]

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42. Similarly, Judge Frank remarked in his dissenting opinion in *United States* v. *Ebeling*, 146 Fed. 254, 258-259 (C. A. 2):

"It has been suggested that because the Krulewitch doctrine diminishes the value of the privilege on which the government relies, that doctrine should be restricted. But I believe that that privilege should be curtailed, for otherwise it gives sustenance to the general notion that the government, in prosecuting a citizen, should be zealously protected by the courts from disclosing to him evidence which it has gathered in preparing for trial and which may aid him in convincing a jury of his innocence. That notion is at variance with the basic principles of our form of government. Thus the Canon of Ethics of the American Bar Association states: 'The primary duty of a lawyer engaged in a public prosecution is not to convict but to see that justice is done. The suppression of facts * * * capable of establishing the innocence of the accused is

The decision of the court below contravenes the policies of the Fifth and Sixth Amendments, of the American common law decisions, and of the Federal Rules of Criminal Procedure, which are to further the interests of justice and fairness by affording due notice to defendants of the charges against them and enabling them to prepare their defense.

B. Judicial Interpretations of Rule 17(c) Support the Views Adopted by the Trial Court.

In *United States* v. *Bondy*, 171 F. 2d 642, the Court of Appeals for the Second Circuit held that a district court has jurisdiction under Rule 17(c) to order an attorney for the Government to produce before trial, for inspection by defendants, documents which would not have been subject to a motion for discovery under Rule 16.

District Judge Bondy had ordered the United States Attorney in the proceeding of *United States* v. *Littell and Marks* (Case No. C127-420, S. D. N. Y.) to produce documents subpoenaed under Rule 17(c), including documents

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highly reprehensible.' As the Wisconsin Supreme Court has said, 'The district attorney is a quasi judicial officer. * * * "A prosecutor should act not as a partisan eager to convict, but as an officer of the court, whose duty it is to aid in arriving at the truth in every case." * * * "His object, like that of the court, should be simply justice. * * *"' Said the Supreme Court, 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer.' He should not try and no court should, I think, assist his efforts, to shut out scrutiny of evidence such as the witness' statement here, which may turn out to be 'pregnant with importance in ascertaining the truth.'" [Citations omitted.]

not obtained from or belonging to defendants and not obtained from others by seizure or process, although such documents could not have been included in a discovery order under Rule 16. The Government sought a writ of mandamus from the court of appeals to direct Judge Bondy to vacate the order. As in the instant case, the Government argued that Rule 17(c) granted the trial judge no authority to require pre-trial production of the documents subpoenaed, because of the limitations of Rule 16. The court of appeals held (171 F. 2d at p. 644):

> "So much of the order [of the District Court] as directs production of the documents designated in the subpoena is authorized by Rule 17(c). The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the court's jurisdiction."[43]

The court rejected the argument advanced here, that the limitations of Rule 16 must be read into Rule 17(c), and held that it is within a district court's jurisdiction and discretion to permit pre-trial inspection of documents under Rule 17(c), although they could not be inspected pursuant to Rule 16. The court also rejected arguments like those made here as to the scope of the subpoena and the designation of the material subpoenaed. In contrast to the decision below, the *Bondy* decision is consonant with the language and history of Rule 17(c) and with the liberal purposes of the Criminal Rules.

Pre-trial inspection subpoenas have been granted against the Government under Rule 17(c) in *United States* v. *Littell and Marks, supra,* Case No. C127-420 (S. D. N. Y., orders of October 30, 1948 and May 16, 1949); *United States* v. *Hiss,* Case No. C128-402, (S. D. N. Y., unreported opinion of November 10, 1949); and the instant case (R. 69-

43. The question whether the district court abused its discretion in the instant case was not raised in the court below (R. 139).

70); and cf. *Kelly* v. *United States*, 73 A. 2d 232, 234 (Mun. C. A. D. C., 1950). In *State* v. *Bunk*, 63 A. 2d 842 (Cy. Ct. N. J., 1949), Rule 2:5-8(c) of the New Jersey Rules of Criminal Practice, which is identical to Rule 17(c), was construed as authorizing pre-trial inspection by defendants of records of a state reformatory and a state penitentiary, and of a murder weapon. The narrative statements which were withheld from examination were comparable to those excluded from the subpoena in the instant case (see material in parentheses in second sentence of subpoena, p. 5, *supra*, and R. 71).

The fact that three judges of district courts have exercised their discretion by denying subpoenas[44] does not show that the Rule itself is unreasonable unless interpreted as if its language incorporated that of Rule 16. The fact that three other District Judges and the Court of Appeals for the Second Circuit have approved subpoenas under the Rule, all of which went beyond the limits of Rule 16 with no disastrous results, is significant. Far more significant, of course, are the plain, adequately safeguarded language of Rule 17(c), its history, and the principles of enlightened policy, constitutional liberty, and common law fairness which both explain and justify the action of the trial court.

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44. *United States* v. *Maryland & Virginia Milk Producers Association*, 9 F. R. D. 509 (D. D. C.); *United States* v. *Brumfield*, 85 F. Supp. 696 (W. D. La.); *United States* v. *Hiss*, 9 F. R. D. 515 (S. D. N. Y.). Of these cases, only the *Brumfield* case took the position that Rule 17(c) should be limited by Rule 16. In that case, the court also gave the grand jury privilege and prematurity as reasons for denying the remedy sought. The *Hiss* and *Maryland & Virginia Milk* cases were decided on the bases of privilege, prematurity and broadness of the subpoenas, none of which is an issue here. In addition, the motion to quash the subpoena in the *Hiss* case was granted largely because of the *ex parte* nature of Judge Conger's order (9 F. R. D. at p. 516), whereas the order involved here was not entered *ex parte*.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX.

This appendix comprises excerpts from opinions in thirty-five criminal cases concerning an accused's privilege of pre-trial inspection of materials in the prosecutor's possession or control. In most of these cases, inspection was permitted or the reviewing court reversed a trial court's denial of inspection. In other cases, the opinions point out that whether or not to permit pre-trial inspection is a matter of discretion for the trial court.

In cases marked*, it is not clear from the opinion that inspection was sought prior to trial. In those marked ‡, the decisions were based in part upon statute.

United States v. *B. Goedde & Co.*, 40 F. Supp. 528, 534 (E. D. Ill.):

> "Defendant Mildred Draper moves to have returned to her certain documents so that she may adequately prepare for trial. The Government resists the motion and moves that the paper be impounded. Obviously the rights of each will be fully protected if the papers are impounded in the Clerk's Office and each party allowed access thereto. The motion for the return of the documents will be denied. The cross motion to impound them with the Clerk is allowed, provided, however, that either party may examine them in the presence of a Deputy Clerk or other representative of the Government."

United States v. *Warren*, 53 F. Supp. 435, 436 (D. Conn.):

> "The nature of the evidence sought to be inspected

here seems to raise no serious possibility of either of the dangers guarded against, tampering with witnesses or fabrication of evidence by the defense. * * * Refusal of inspection might well create a situation in which fairness would require adjournments or delays in the course of trial.

"The motion for permission to examine the evidence enumerated is granted. * * *"

Parsons v. *State*, 251 Ala. 467, 476, 477 (1948):

"*We think that due process* would relieve any confidential nature of the proposed evidence, such as applies to the department agents, and *would demand its allowance as evidence.* This principle applies, as we have shown, to the matter of disclosing the name of an informer when it is material to the proper disposition of the case."

* * * * *

"We think the court should have granted the timely motion to request the Attorney General of the United States to release the evidence * * *."

United States v. *Rich*, 6 Alaska 670, 671-672 (1922):

"The whole purpose of a law trial, criminal or civil, is to ascertain the truth. No unfair handicap is imposed upon either party by allowing the other to have full knowledge of inanimate objects intended to be used in evidence. * * * The law of English-speaking states nearly everywhere provides by statute or long precedent for the inspection of written documents. * * * The reason seems to me to be fully as strong in criminal cases. * * * Inspection by the defendant before trial merely offers him the means of showing, if he can, that the prosecution's theory is wrong."

* * * * *

"In the case at bar, the prosecution expects to prove by expert testimony that finger-prints on the glass in question are those of defendant. *He cannot have a*

*fair trial without having reasonable opportunity to show—if he can—by expert testimony that the finger prints were not made by him; * * * This cannot be done at a moment's notice.''* (Italics supplied.)

State v. *Superior Court*, 39 Ariz. 242, 249 (1931):

"The question has frequently been before the courts as to whether a defendant in a pending case may compel the state to furnish him with a list of the latter's witnesses or be given the opportunity to inspect articles to be used in evidence. It has been held that in the absence of some special reason why the request should be granted, it is not error for the court to refuse such request. [Citing cases.] But it is also held that *where justice and a fair interpretation of the law require that such inspection be granted, it should be allowed.* [Citing cases.]

"We are of the opinion that *such a rule is in the interest of justice,* and that *it is left to the sound discretion of a trial court* when a proceeding is pending therein as to whether such inspection and examination should be allowed or not, and the same rule would apply to inspection of premises, as in this case." (Italics supplied.)

Jones v. *State*, 213 Ark. 863, 866 (1948):

"We see no reason why this request was not granted, in fact, we think it should have been, but we cannot say that this was such prejudicial error as calls for the reversal of the judgment. Copying the confession would have furnished no evidence that it was not freely and voluntarily made."

Massie v. *People*, 82 Colo. 205, 217 (1927):

"If, under any circumstances, the motion was good *its allowance seems clearly discretionary, reviewable only for gross abuse* and none such is disclosed." (Italics supplied.)

‡ *Daly* v. *Dimock*, 55 Conn. 579, 589, 590 (1887):

"The argument that the writ ought not to be granted because it is the indicted party who asks for it is not a very weighty one. *The law presumes every man to be innocent until the contrary appears;* and *its policy is to give every man accused of crime a reasonable opportunity to prepare and present to a jury his defense.* The state does not desire to procure convictions by any unfair concealment or surprise. It concerns itself quite as much in having the innocent acquitted as in having the guilty convicted. While it affords every reasonable facility for the prosecution of offenders, it is no less solicitous to give every accused person a fair and reasonable opportunity to make his defense."

* * * * *

"* * * But it is said that the writ is not demandable as a matter of right, but is awarded in the discretion of the court. *It is doubtless true that in many cases the court will exercise its discretion. The court however will not refuse the writ where the relator has a clear legal right,* there is a substantial matter involved, and there is no other adequate remedy. In this case, as we have seen, the relator has a clear legal right." (Italics supplied.)

Padgett v. *State*, 64 Fla. 389, 396 (1912):

"* * * *The matter rests in judicial discretion,* and this discretion will be reviewed only for the purpose of ascertaining if the defendant was in fact surprised. * * * It is sufficient to say that a careful examination of the transcript, aided by the briefs * * * fails to show any abuse of the discretion vested in the trial judge, or that the defendant was surprised or harmed in any way by such ruling, * * *." (Italics supplied.)

People v. *Gerold*, 265 Ill. 448, 470 (1914):

"Had the plaintiff in error had an opportunity of examining, under proper conditions, these various documents, it is possible that he could have obtained positive evidence as to the payment of the money to the proper persons. *The whole theory of our law as to the trial of one accused of crime is to give him an opportunity to know the charges against him, so that he can make proper investigation and preparation for the trial.* We see no reason why the motion of plaintiff in error on this point should not have been granted by the trial court." (Italics supplied.)

Trustees of Schools v. *American Surety Co.*, 307 Ill. App. 398, 414 (1940):

"* * * If appellants' motion had been made in apt time and had it disclosed a refusal by appellees to permit this appellant to examine the books and records of the school treasurer, the court undoubtedly would have protected appellants' interests and if it had not, this appellant would them [*sic*] be in a position to complain."

‡ *Weer* v. *State*, 219 Ind. 217, 228 (1941):

"* * * There is a lack of harmony in the decisions as to the right of an accused to the inspection and disclosure of evidence in the possession of the prosecution. * * * We find it unnecessary, however, to look beyond the statute. * * * *The right to have a production of papers* under our statute is not an absolute one, but *is addressed to the sound discretion of the court.*" (Italics supplied.)

‡ *State* v. *Hinkley*, 81 Kan. 838, 847-848 (1910):

"We agree with counsel for appellant that in common fairness they should have been permitted before going to trial to inspect the transcript of the testimony taken at the coroner's inquest. It is a record which

the law requires to be filed in the office of the county clerk * * *, and which the appellant and his counsel had as much right to examine as counsel for the state. * * * *It is doubtful if any excuse can be urged for depriving him of the right to inspect such a record, unless it be founded in the mistaken notion of the rights of a person accused of crime and the relations which the state bears toward such a person. The state is never interested in the conviction of an innocent person, but, on the contrary, is interested in his acquittal.* * * * [The prosecuting attorney] should refrain from doing anything unfair or prejudicial to the rights of the accused to a fair trial. *The prosecutor's duty to the state did not require him to withhold evidence which the accused in justice is entitled to the benefit of,* nor justify him in treating the accused unfairly in the argument or in remarks made in the presence of the jury." (Italics supplied.)

Wendling v. *Commonwealth*, 143 Ky. 587, 599 (1911):

"* * * We are not prepared to say that the court abused a *sound discretion* in refusing this request." (Italics supplied.)

State v. *Bramhall*, 134 La. 1, 2-3 (1913):

"His defense being that the liquors sold by him were nonintoxicating, he called upon the prosecution to furnish him a sample of the liquor which it claimed he had sold, in order that he might have it analyzed. If this request had been made in a sincere effort to establish the truth, its refusal would have been error, if it was in the power of the prosecution to comply with it. The guilt or innocence of the accused depending upon whether the liquor is intoxicating or not, it stands to reason that he is entitled to have it analyzed, and is entitled to have a sample of it for that purpose if within the power of the prosecution to give it."

State v. *Dorsey*, 207 La. 928, 964, 966 (1945):

"*Every defendant in a criminal case is presumed to be innocent until the contrary appears, and it is the policy of the law to give to every man accused of a crime a reasonable opportunity to prepare and present his defense to the court or the jury.* The State of Louisiana does not want to secure convictions by any unfair concealment or surprise. It is the duty of the State to concern itself as much in having the innocent acquitted as in securing the conviction of the guilty, and the State is desirous of giving every accused person a fair and reasonable opportunity to make his defense. This being so, we are of the opinion that a pre-trial inspection of defendant's own confession is a just and fair concession which should be made in this State."

* * * * *

"*Under the provisions of the Constitutions of the United States and this State, every accused is entitled to, and is guaranteed a fair trial, and to deny his counsel a pre-trial inspection of accused's written confession is,* in our opinion, *tantamount to depriving such accused of a fair trial,* and is *in violation of his constitutional rights.* This being so, Section 976 of the Revised Statutes must yield in so far as it may deny this right." (Italics supplied.)

State v. *Lowery*, 160 La. 811 (1926):

"The alleged whisky was at all times in the possession of the state, and no valid reason has been given why it could not have been produced in open court when the motion was filed, in order that defendant might have it analyzed. In such a proceeding, the case for the prosecution could not have been injured since, if the liquid was actually whisky, the analysis would have confirmed that fact. On the other hand, it was an essential element of appellant's defense to demonstrate, if he could do so by an analysis, that the alleged intoxicant was not whisky."

State v. *Haas*, 188 Md. 63, 75-76 (1947):

> "* * * *the tendency in the courts of this country is to permit discretion in the trial judge.* The argument made against any such discretion is based upon a fear that the State, which is charged with the prosecution of crime, may be hampered in its duty by the disclosure of its evidence to those charged with offenses. Whatever merit that argument has as applied to a situation where it is contended that the accused has a *right* (court's italics) to inspect the evidence, it has no application, we think, to a situation where the trial judge in each case and on each application, determines what should be done in the interest of justice.
>
> * * * * *
>
> "It is our conclusion that such an application as the one we are now considering should be left to the discretion of the trial court, not to an unlimited discretion but to a discretion subject to review if abused. * * * We are not impressed by the fear of the prosecuting attorneys that the exercise of such discretion will change the whole practice of the criminal law in this State, or will make the securing of proper convictions more difficult to obtain. * * * On the other hand, there seems to be a measure of *elemental justice* in permitting one accused of crime to see a confession alleged to have been made by him, which he expects to be produced against him at this trial. * * *" (Italics supplied.)

Commonwealth v. *Noxon*, 319 Mass. 495, 535 (1946):

> "The judge did not err in these matters. It was within his *discretion* to grant or deny the motions." (Italics supplied.)

Commonwealth v. *Jordan*, 207 Mass. 259, 264-265 (1911):

> "As to those matters it is plain, we think, that *it was within the discretion of the judge to grant or refuse the motion.*" (Italics supplied.)

State v. *Naething*, 318 Mo. 531, 539-540 (1927):

"We can see no reason why appellant should not have been accorded this privilege under such safeguards as the trial court thought necessary in order to guard against any possible substitution or trickery. Appellant cites numerous cases under paragraph 2 of his brief, which our Reporter will append. They fully support appellant's right to such an inspection. No cases from this State are cited, but precedent of our own is scarcely necessary because *the granting of such a request accords so thoroughly with our sense of what is fair and just to one accused of crime.*" (Italics supplied.)

State v. *Tippett*, 317 Mo. 319, 326-27 (1927):

"The prosecuting attorney is both an officer of the State and of the court, and his duty extends no further than an impartial, fair and just trial of defendant. If Tucker's statement comprised the truth, it would have availed defendant nothing in the inspection of it. If in any manner it tended to show that defendant was not guilty of the offense charged, he was entitled to the benefit of it. That it was desired that the State's evidence remain undisclosed, partakes of the nature of a game rather than judicial procedure. *The State in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial.*" (Italics supplied.)

Hameyer v. *State*, 148 Neb. 798, 802-803 (1947):

"* * * This section of the statute was applied * * * to procedure in criminal actions but an examination of its history discloses that it has no proper application in such actions, but applies only in civil actions. * * *

"This is not to say, however, that a like rule of procedure is not applicable to criminal proceedings. In *Cramer* v. *State* * * *, this court, *independent of statute*, said: 'If a prosecution is based upon the correctness or incorrectness of certain records * * *, the examination of such records by the defendant should be granted.' *This rule is* reasonable but *discretionary and should be enforced when the ends of justice require it.*" (Italics supplied.)

Cramer v. *State*, 145 Neb. 88, 95 (1944):

"In the administration of these rules *the trial court has a broad judicial discretion* and it is only when such discretion is abused that error can be based thereon." (Italics supplied.)

Matter of Hughes v. *Kings County Court*, 181 N. Y. Misc. 668, 673 (1943):

"There is no good reason why in a proper case, in the exercise of a sound discretion, the courts of criminal jurisdiction should not be permitted to make available to a defendant before trial, by discovery and inspection, legal evidence in the possession of the district attorney. The primary object of the criminal court is to render substantial justice and not to obtain a conviction. If there is anything about the bullets and gun which would tend to show the innocence of the defendants, they should have an opportunity to inspect the same in advance of the trial and not depend upon the hurried examination which would be permitted upon the trial." (Italics supplied.)

People v. *Gatti*, 167 N. Y. Misc. 545, 552-553 (1938):

"In the absence of specific statutory procedure and practice or legal precedents to the contrary, *this class of motions for the relief of discovery and examination must be left, because of the conditions in these modern times and the variety of reasons arising often out of complex situations in criminal causes, to the*

sound judgment of the court in the light of all the circumstances and *according to a real sense of the justice of the cause*, as may appeal to the individual judge without attempting at this time to lay down a hard and fast rule in the matter."

* * * * *

"*The ultimate purpose of the administration of the criminal law is to do justice*, not blindly, but rather by means that are fair, and that will accomplish the purposes of the law for the protection of society. What part considerations of public policy play in these and similar cases must in a large measure depend upon the merits of the application disclosed by the moving papers, the good faith of the applicant and whether his *constitutional rights* are safe-guarded and protected, as well as those of the public." (Italics supplied.)

Matter of Attorney General of United States, 160 N. Y. Misc. 533, 536-537 (1936):

"Ample authority exists for the proposition that the courts are not limited to applications by *defendants* to exercise the inherent power to permit inspections of grand jury minutes.

* * * * *

"*In the proper exercise of a sound discretion the power inherent in the court to grant the application should be exercised.*" (Italics supplied.)

People v. *Rogas*, 158 N. Y. Misc. 567, 570 (1936):

"The proposed inspection may be of incalculable benefit to the defendant. A right sense of justice seems to decree that this is a proper occasion for the exercise by the court of its discretionary power. The motion is granted."

People v. *Wargo*, 149 N. Y. Misc. 461, 464 (1933):

"*The court is under a duty to compel the production*

of competent documents at the very moment they are called for by counsel for the defendant when the circumstances of the case make them presently important. (*People* v. *Miller*, 257 N. Y. 54, at p. 59.)

"The following circumstances make the letters in question presently important at this time in order that the defendant may properly prepare for trial expert evidence as to their authenticity." (Italics supplied.)

People v. *Kresel*, 142 N. Y. Misc. 88, 89-91 (1931):

"In reference to the ground first above stated, the defendant makes an argument which, if this court is not otherwise concluded by authority, is one that appeals to the court as sound in basis. That is, the argument that *the People of the State are not seeking victims but criminals, and* that *each person accused of crime should be given the benefit of every reasonable opportunity to prepare for his defense and to prove his innocence.* (*People* v. *Bellows*, 1 How. Pr. [N. S.] 149; *Daly* v. *Dimock*, 55 Conn. 579.)"

* * * * *

"Counsel for both sides cite *People ex rel. Lemon* v. *Supreme Court of the State of New York* (245 N. Y. 24), as authority for the disposition of this application, the defense claiming that the opinion in such case gives a basis for its application, and the People contending that such opinion gives ample reason to deny the application herein. * * * The reasoning followed by the learned chief judge in his opinion on the question at point here is such as to incline this court to believe that in a case where evidential matter is in the hands of the People and is needed by a defendant to afford him a fair trial, the court would grant an application to inspect such evidential matter. This conclusion is reinforced by the comment of the learned Court of Appeals in *People* v. *Miller* (257 N. Y. 54), on the failure of a district attorney to produce for the use of the defendants grand jury minutes used as the

basis for the cross-examination of a witness. *If we reach the conclusion that evidential matter should be made available on trial, this leads to the further conclusion that, in a case similar to the one here, where the matter sought is of great volume and intricacy, that such matter should be furnished by the People for inspection by the defendant's counsel before trial so as to avoid delay during the trial.*" (Italics supplied.)

People v. *Radeloff*, 140 N. Y. Misc. 690 (1931):

"I can see no reason why defendant should not be furnished with these documents, especially since he claims that the copies are not in his possession, and form the subject of this charge. * * *

"Motion granted."

People v. *Bellows*, 1 How. Pr. N. S. 149, 151 (N. Y. O. & T., 1884):

"The defendant should be advised of the accusation against him, with sufficient certainty to enable him to prepare for his defense. There is no good reason why such a requirement should not be enforced. *Each person accused of crime should be given the benefit of every reasonable opportunity to prepare for his defense, and to prove his innocence. The law is not seeking victims, but criminals, and every man until he is proved to be guilty is presumed to be innocent.* If, for example, a person is charged with appropriating a check belonging to another, and its proceeds, and desires it, a copy of the check should be given to him." (Italics supplied.)

State v. *Circuit Court of Minnehaha County*, 60 S. D. 115, 118, 119, (1932):

"The learned assistant attorney general contends, first, that the court is without power to compel an inspection. The contention is made that no such

power existed at common law, and that our statute * * * cannot be made applicable to criminal cases * * *."

* * * * *

"We are of the opinion that the power exists. It exists either by virtue of statute, *or by virtue of an inherent power within the court to compel an inspection in furtherance of justice,* or by virtue of a 'process of analogy' to the civil statute, thereby making the procedure in civil and criminal actions uniform to the extent permitted by the Constitution. Conceding that our statutes strictly construed are not sufficient to authorize the power in a criminal proceeding, nevertheless, we believe that the development of the procedure, since the enactment of the first of the civil statutes upon which our civil statute is based sustains our conclusion that *the power exists either by virtue of now being inherent in the court or by virtue of a process of analogy to the civil procedure,* which has made the practice of allowing an inspection of documents a part of the substance of the procedural system of the state." (Italics supplied.)

State v. *Morrison,* 175 Wash. 656, 658 (1933):

"It is urged that the trial court erred in its refusal to permit inspection of certain writings and documents in possession of the prosecuting attorney which had been considered by the grand jury. * * * Even now appellant fails to point out anything prejudicial which resulted, and we have been unable to learn from the record of any prejudice actually suffered by reason of the trial court's ruling. It is a settled law of this state that *such matters are peculiarly within the discretion of the trial court,* and that we can interfere only when there has been a manifest abuse of discretion." (Italics supplied.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 435

BOWMAN DAIRY COMPANY, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND
WILLIS L. HOTCHKISS.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

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March 1951.

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REPLY BRIEF FOR THE PETITIONERS.

Part I of this reply brief will deal with those matters presented in the Introduction and in Part I of the Government's brief which are not discussed in petitioners' principal brief. Similarly, Part II herein is directed to contentions advanced in Part II of the Government's brief. Throughout this reply brief, the sequence of the Government's brief is adopted.

I.

Petitioners have advanced the contention that Rules 16 and 17(c) have separate and distinct functions, as well as differing purposes and effects. They have contended that the general rights of discovery afforded by Rule 16 exist throughout the course of the proceeding after the return of an indictment or information and are qualified only by the necessity that discovery thereunder be material to the preparation of a defense and that the request be reasonable (Petitioners' Br. 34 and note 21). On the other hand, petitioners contend that the limited discovery allowed under Rule 17(c) must have a definite but flexible relationship to trial, depending upon the complexity of the particular case. This theory is described by the Government as "ingenious" (Br. 13).

Broadly, the Government's theory is that the rights of inspection specifically set forth in Rule 17(c) are merely to test "proffered evidence for authenticity and to determine whether to object to its introduction" (Br. 34). If that be the basis for the inspection allowed under Rule 17(c), why the discretionary provision in the last sentence of the Rule that the court "*may*, upon their production, permit the books, papers, documents or objects, or portions thereof, to be inspected by the parties and their attorneys"? (Italics supplied.) Certainly, even without benefit of the Rule, if the "books, papers, documents or objects" are to be offered in evidence, the adversary may have reasonable inspection. This is as "traditional" as the subpoena itself. There must be an additional reason for the discretion set forth in the above quotation from Rule 17(c).

Petitioners conclude that the reason discretion is specifically given in Rule 17(c) for pre-trial inspection is for the purpose of eliminating possible surprise and resulting delay during trial, and to achieve a limited discovery com-

mensurate with fairness so that a party may have an opportunity to adduce evidence in avoidance or rebuttal.[1] Such a ruling in a criminal proceeding is stigmatized by the Government with the appellation "discovery". It might well be described as "enlightened judicial thinking", in line with the purposes of the Federal Rules of Criminal Procedure as set forth in Rule 2. We submit that the "ingenious" theory of the petitioners thus suddenly becomes ingenuous.

The Government contends that neither the prior federal practice nor the overwhelming weight of state authority recognized any broad right of discovery in criminal cases under the common law (Br. 21). But of the 46 cases (40 of which are appellate court cases) cited by the Government in Notes 10,[2] 11,[3] and 12 (Br. 20-22), only four reverse a trial court's order for pre-trial inspection, namely *State* v. *Jeffries*, 117 Kan. 742 (1925);[4] *State* ex rel. *Robertson*

[1] Note Judge Yankwich's remarks quoted on p. 25 of petitioners' principal brief.

[2] With reference to confession cases, the Government cites *State* v. *Dorsey*, 207 La. 928 (1945); *State* v. *Haas*, 188 Md. 63 (1947); and *State* v. *Cala* (Ohio App.), 35 N. E. 2d 758 (1940), as *contra* to its position. Additional cases granting pre-trial inspection of confessions are *State* v. *Burris*, 198 Ia. 1156 (1924); *People* v. *Rogas*, 158 N. Y. Misc. 567 (1936); *People* v. *Kresel*, 142 N. Y. Misc. 88 (1931); and *Jenkins* v. *State*, 45 Tex. Cr. R. 173 (1903); see also *Jones* v. *State*, 213 Ark. 863 (1948); *Cramer* v. *State*, 145 Neb. 88 (1944); and *State* v. *Clark*, 21 Wash. 2d 774 (1944).

[3] In addition to *Daly* v. *Dimock*, 55 Conn. 579 (1887); *People* v. *Miller*, 257 N. Y. 54 (1931); and *Mohler* v. *Commonwealth*, 132 Va. 713 (1922), which the Government recognizes as allowing inspection of grand jury minutes and similar records, the following cases likewise permitted such inspection: *State* v. *Burris*, 198 Ia. 1156 (1924); *State* v. *Hinkley*, 81 Kan. 838 (1910); *People* v. *Kresel*, 142 N. Y. Misc. 88 (1931); *Jenkins* v. *State*, 45 Tex. Cr. R. 173 (1903), see also *Matter of Attorney General of the United States*, 160 N. Y. Misc. 533 (1936); *State* v. *Morrison*, 175 Wash. 656 (1933).

[4] But cf. *State* v. *Hinkley*, 81 Kan. 838, 846-849 (1910).

v. *Steele*, 117 Minn. 384 (1912); *State* v. *Terte*, 324 Mo. 925 (1930); and *State* v. *Yeoman*, 112 Ohio St. 214 (1925).[5] Moreover, only in the *Terte* case was the reversal based on the ground that scope of inspection was too broad, and there the decision was based on a strict interpretation of the language of the applicable statute (but cf. *State* v. *Naething*, 318 Mo. 531, 539-540 (1927)). In this connection, it is pertinent to note that the common law cases were, as a rule, concerned with simple matters, and that the scope of the request for, and the granting of, pre-trial inspection were limited by the very nature of the ordinary common law case. (See remarks of Professor Dession, Petitioners' Br. 27.)

In discussing the history of Rule 16 of the Federal Rules of Criminal Procedure, the Government relies (Br. 23, note 14) on the following statement in the notes to the Preliminary and Second Preliminary Draft of that Rule:

> "Inspection has frequently been denied where the motion was regarded as a 'fishing expedition' or an attempt to force the government to disclose its case."[6]

This statement was excised from the final note to Rule 16, probably because the intervening decisions of this Court in *Hickman* v. *Taylor*, 329 U. S. 495, buried any "fishing expedition" objections.

In discussing Rule 16, the Government quotes (Br. 24-25, note 15) from Judge Learned Hand's opinion in *United States* v. *Garsson*, 291 Fed. 646, 649 (S. D. N. Y., 1923). However, that opinion was concerned with the inspection of grand jury minutes—a question not involved here. The

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[5] But cf. *State* v. *Cala*, 35 N. E. 2d 758, 760-761 (Ohio Ct. of Apps., 1940).

[6] Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 103; Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), p. 95.

Garsson opinion reflected the common law policy of maintaining the secrecy of grand jury proceedings, but Rule 6(e) of the Criminal Rules permits the disclosure of matters occurring before the grand jury in certain circumstances. Moreover, Judge Hand's views on the rights of an accused have been modified since 1923. Cf. *United States* v. *Coplon*, 185 F. 2d 629 (C. A. 2); *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2).

The Government shows that the second preliminary draft of Rule 16 was limited to documents "constituting evidence in the proceeding" (Br. 25) but does not explain that this language was removed from the final draft of Rule 16, thereby indicating that the draftsmen of the Criminal Rules rejected the evidentiary test as unsatisfactory. Although thus aware of the evidentiary test, it should be noted that the draftsmen of the Criminal Rules never saw fit to write it into Rule 17(c). Nor was the evidentiary test followed in the *American Tobacco* case (see note 7, *infra*), and Rule 17(c) was patterned on that case (see Petitioners' Br. 28).

II.

The Government urges that "Under petitioners' sweeping interpretation of the subpoena privilege, there are no limits upon the power of a court to order pre-trial production of documents under Rule 17(c)" (Br. 30). Petitioners have made no such contention, but have, instead, pointed out that Rule 17(c) contains its own limitations (Br. 28-29). A district court's inspection order under Rule 17(c) could, of course, be reviewed for abuse of discretion, but, as noted by Judge Lindley (R. 139), the Government has never contended that the district court abused its discretion.

The Government again urges that the limitations of

Rule 16 must be read into Rule 17(c) because of the *ejusdem generis* rule (Br. 30). Rules 16 and 17(c) have separate and distinct functions (Petitioners' Br. 29-36), so that the *ejusdem generis* rule is inapplicable for that reason, as well as for the other reasons presented in petitioners' principal brief (at pp. 17-18). Judge Lindley's refusal to read the limitations of Rule 16 into Rule 17(c) (R. 139) is especially persuasive because he was Panel Chairman of the American Bar Association's Institute (August 24, 1943) considering Rule 17(c).

In attempting to support its argument that the limitations of Rule 16 must be read into Rule 17(c), the Government states (Br. 31) that "Since one of those limits [in Rule 16] is that pre-trial discovery is only available in favor of defendants, it follows that pre-trial discovery against defendants is not permitted under Rule 17(c)." Such a tortuous construction is not only inconsistent with the plain language of Rule 17(c) and its history, but the Government itself has employed Rule 17(c) for discovery purposes against one of the corporate petitioners herein (Petitioners' Br. 44, note 26), and even before the Criminal Rules were promulgated, employed pre-trial subpoenas *duces tecum* for discovery purposes (Petitioners' Br. 28). In fact, one of the draftsmen of the Criminal Rules explained that Rule 17(c) "sanctioned" the use of pre-trial discovery subpoenas *duces tecum* by the Government (Petitioners' Br. 28).

Because Rule 16 applies only to discovery against the Government, reading its limitations into Rule 17(c), as advocated here by the Government, would mean that all documents in the Government's possession, unless "obtained from or belonging to the defendant or obtained from others by seizure or by process" (Rule 16), would be privileged documents which an accused could never inspect before trial. Such a result is not in accord with

the language of Rule 17(c) and would discriminate between subpoenas addressed to the prosecutor and subpoenas addressed to others (Petitioners' Br. 44-45).

Although the Government attempts to distinguish *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 116 (C. A. 6), affirmed, 328 U. S. 781, on the ground that it involved only trial subpoenas (Br. 33), Professor Dession's statement of that case, quoted at page 28 of the petitioners' principal brief, is correct.[7]

In their principal brief (at pages 35-36), petitioners discussed the relevance of *United States* v. *Burr*, 25 Fed.

[7] Petitioners have been advised by Ralph D. Ray, one of the attorneys in the *American Tobacco Company* case, that the following procedure was adopted there:

> "It is quite true that the Government was permitted to inspect documents produced pursuant to subpoena without being restricted to documents which were to be offered in evidence. In fact, a large number of the documents which the Government attorneys inspected were not offered in evidence although, of course, some of them were.
>
> "The procedure followed was the issuance of a very broad subpoena which was returnable on the date tentatively set for trial. In response to this subpoena the Company produced approximately 250 files of documents which had been brought to the court house by truck. On that date a new trial date was assigned approximately one month later, but the court refused to order the return date of the subpoena changed. Instead, upon application by the Government, all of the documents produced in response to the subpoena were ordered impounded, and upon further application by the Government, the Government attorneys were given the right, during the month's interval before the new trial date, to inspect the papers so impounded.
>
> "The only limitation was that the court said that, with respect to any particular documents which the defendant might claim were irrelevant, privileged, or for any other reason should not be inspected, the court would, on application of the defendant, examine such documents in order to determine whether inspection should be permitted. There was no proviso limiting inspection to documents to be offered in evidence or requiring that the Government offer in evidence all documents inspected."

Cas. 14,692d, 14,694 (C. C. D. Va.) to Rule 17(c). Subsequent to the completion of their principal brief, petitioners observed that the original notes on Rule 17 refer to the Sixth Amendment and to 18 U. S. C. (1940 ed.) § 563, both of which are involved in the *Burr* case. Thus the preliminary and second preliminary notes to what is now Rule 17 stated that

> "The rule does not abridge or modify the rights of defendants under United States Constitution, Amendment VI; 18 U. S. C. § 563 * * *."[8]

Since these notes are also relevant to the final version of Rule 17(c) (see Petitioners' Br. 26, note 15), they are a further indication that Rule 17(c) was not meant to override the *Burr* case.

As shown in petitioners' principal brief (at pp. 36-37), any question as to the designation of the documents called for in the subpoena has been waived by the Government. Moreover, under decisions discussed in the petitioners' principal brief (at pp. 37-38, 65-66), the documents were adequately designated. In *United States* v. *Bondy*, 171 F. 2d 642, 644 (C. A. 2), the district court had approved a subpoena of comparable breadth to that involved here. The Government attacked the breadth of the subpoena in the court of appeals, but the district court's order was held "authorized by Rule 17(c)." The documents designated in the *Bondy* subpoena are set out in Appendix B hereto. Similarly, in *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 116 (C. A. 6), affirmed, 328 U. S. 781, on which Rule 17(c) is patterned (see Petitioners' Br. 28), very broad pre-trial discovery subpoenas *duces tecum* were allowed (see note 7, *supra*). With one exception (discussed *supra*, p. 4), pre-trial inspection orders have apparently

[8] Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 106; Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), p. 98.

never been reversed on the ground of scope. The breadth of inspection of course depends on the type of case. Where, as here, a complicated criminal proceeding involves thousands of documents, the *Bondy* and *American Tobacco* cases recognize that liberal inspection is appropriate (see also Petitioners' Br. 27). Cf. *Bethlehem Shipbuilding Corp. v. National Labor Relations Board*, 120 F. 2d 126, 127 (C. A. 1).

The Government's brief consistently complains of an alleged "dragnet" or "fishing expedition" designation here, and it is stated that petitioners are attempting to obtain a general disclosure of the Government's entire case by use of the subpoena *duces tecum* (Br. 32, 34, 35, 37). However, the subpoena *duces tecum* does not attempt to obtain a complete disclosure of the Government's case. In the first place, the subpoena is limited to documentary materials and objects. In addition, it excludes "memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews" (R. 48). Thus, the district court excluded the "work product" of Government counsel, and also excluded narrative statements or memoranda of interviews prepared by others but solicited by or volunteered to Government counsel. These exclusions were directed by the district court because the Government had objected to the breadth of the petitioners' motion for a subpoena at the October 24, 1949 hearing. After the district court, in response to the Government's suggestion, narrowed the scope of the subpoena, the Government never again attacked the scope of the subpoena until its reply brief in the court of appeals. In fact, at the November 7, 1949 hearing in the district court, the Government expressed itself as satisfied with the form of the subpoena (R. 61, 62) as restricted by the district court at the October 24, 1949 hearing.

The Government has never disclosed how many documents are covered by this subpoena. Although they may be voluminous, it is also possible that there may be very few documents of the type designated in the subpoena. Thus, in the companion Robinson-Patman criminal cases pending against some of the petitioners herein,[9] the Government complied with subpoenas *duces tecum* under Rule 17(c) and produced a mere handful of documents thereunder. But because the Government's brief consistently complains of an alleged "dragnet" or "fishing expedition", it seems appropriate to refer also to cases decided under Rule 45(b) of the Federal Rules of Civil Procedure. Decisions under that Rule are pertinent, for the final note to Rule 17(c) states that it is "substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure." Decisions under Rule 45(b) upholding broad subpoenas include *Wagner Mfg. Co.* v. *Cutler-Hammer*, 10 F. R. D. 480, 483-484 (S. D. Ohio); *403-411 E. 65th Street Corp.* v. *Ford Motor Corp.*, 27 F. Supp. 37, 38 (S. D. N. Y.); *Camuso* v. *City of Niagara Falls*, 9 Fed. Rules Serv. 30b.34, Case 1 (W. D. N. Y.); *Savannah Theatre Co.* v. *Lukas & Jenkins*, 8 Fed. Rules Serv. 45b.31, Case 1 (N. D. Ga.); *In the Matter of Chopnick*, 6 Fed. Rules Serv. 45b.413, Case 1 (S. D. N. Y.); cf. *Hercules Powder Co.* v. *Rohm & Haas Co.*, 3 F. R. D. 302 (D. Del). In those cases, the courts noted that the breadth of a subpoena *duces tecum* depends on the facts of the case, and that the nature of the case often requires approval of a liberal designation. Cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 210, note 46; *United States* v. *United Shoe Machinery Corp.*, 76 F. Supp. 315, 316-317 (D. Mass.); *United States* v. *United States Alkali Export Ass'n*, 7 F. R. D. 256, 259 (S. D. N. Y.); *United States* v. *North Coast Transportation Company*, 8 F. R. D. 62, 63

[9] *United States* v. *Bowman Dairy Company, et al.*, No. 48 CR 361 (N. D. Ill.); *United States* v. *The Borden Company, et al.*, No. 48 CR 362 (N. D. Ill.).

(W. D. Wash). In the instant case, literally millions of transactions over a period of more than seven years are involved, so that such considerations are particularly cogent.

The Government asserts that pre-trial discovery is not an appropriate way to ascertain with greater particularity the nature of charges against defendants (Br. 37, note 22). However, courts regularly deny motions for bills of particulars or for more definite statement on the ground that discovery procedures make such motions unnecessary. Since the district court denied the petitioners' motion for a bill of particulars (except in two minor respects) in the very order in which it denied the Government's motion to quash this subpoena *duces tecum* (R. 75), it seems likely that the court was merely following the modern pattern of denying particulars which could be ascertained through discovery mechanisms, especially because the Government had urged the district court to deny petitioners' motions for a bill of particulars in view of the available discovery provisions.

The Government's brief assumes that the subpoenas *duces tecum* involved in the *Burr* case were limited to one letter from General Wilkinson to President Jefferson (Br. 39-40, note 27; see also Br. 20, note 9; 23, note 14; 36). However, the subpoena *duces tecum* served on President Jefferson covered General Wilkinson's October 21, 1806 letter to the President, together with the accompanying documents, the answer thereto and all military and naval orders concerning Aaron Burr. See *United States* v. *Burr*, 25 Fed. Cas. No. 14,692d (C. C. D. Va.) at pp. 31, 36, 37, 38; *United States* v. *Burr*, 25 Fed. Cas. No. 14,693 (C. C. D. Va.) at pp. 65, 68, 69-70. A subpoena *duces tecum* was also awarded in the *Burr* case directing Prosecutor Hay to produce General Wilkinson's letter of November 12, 1806, to President Jefferson. *United States* v. *Burr*, 25 Fed. Cas.

No. 14,694 (C. C. D. Va.) at pp. 189-190. After the Government's objections were rejected by the court, all documents designated in those subpoenas *duces tecum* were produced.[10] In two of his opinions in the *Burr* case (25 Fed. Cas. at pp. 32-38, 190-192), Chief Justice Marshall overruled the contentions advanced here by the Government.

Conclusion.

For the foregoing reasons, and the reasons given in petitioners' principal brief, it is respectfully submitted that the judgment of the court below should be reversed.

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March 1951.

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[10] See *United States* v. *Burr*, 25 Fed. Cas. No. 14,693 (C. C. D. Va.) at pp. 65, 68, 69-70, 74-75, 85, 87; *United States* v. *Burr*, 25 Fed. Cas. No. 14,694 (C. C. D. Va.), at pp. 189, 190, 192-193.

APPENDIX A.

Petitioners wish to make the following observations with reference to the Government's analysis of cases set forth in the Appendix of petitioners' principal brief:

(1) Cases listed in Group 2(a) (Government's Br. 42):

State v. Superior Court, 39 Ariz. 242 (1931), is the only case which reverses a trial court's granting of pre-trial inspection, the reversal being based *solely* on the ground that no "case" or "proceeding" was pending before the trial court.

All other cases in the group, in denying pre-trial inspection (*People* v. *Gatti*, 167 N. Y. Misc., 545 (1938)) or in refusing to hold that such denial constitutes reversible error, expressly recognize judicial discretion in the trial court to grant pre-trial inspection.

(2) Cases listed in Group 2(b) (Government's Br. 42):

In the first four cases, the reviewing court held that pre-trial inspection was so important that denial of inspection constituted reversible error.

(3) Cases listed in Group 3 (Government's Br. 43-44):

Trustees of Schools v. *American Surety Co.*, 307 Ill. App. 398 (1940), was included in petitioners' Appendix to indicate that the case of *People* v. *Gerold*, 265 Ill. 448 (1914), is still followed in Illinois.

Matter of Attorney General of United States, 160 N. Y. Misc. 533, 536-537 (1936), was included since the dictum quoted at page 11 of petitioners' Appendix indicates that pre-trial inspection by a defendant of Grand Jury minutes is within the trial court's inherent discretionary power.

Very few of the decisions cited in the Government's brief hold that a trial court has no power to permit an accused to inspect, before trial, materials in the prosecutor's control, and those few decisions are plainly unsupportable (see Petitioners' Br. 50-67).

APPENDIX B.

The books, papers, documents and objects in the Government's possession which the defendants were permitted to inspect, copy or photograph pursuant to their Rule 17(c) subpoena *duces tecum* in *United States* v. *Littell and Marks* (Case No. C 127-420, S. D. N. Y.), *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2), were as follows:

1. All books, financial statements, corporate records (including directors' minutes, stock certificate books and articles of incorporation), income tax statements, correspondence, assignments, patents, patent applications, agreements and contracts of the American Hyalsol Corporation (hereinafter referred to as Hyalsol) since the date of its incorporation.

2. Correspondence, reports, memoranda, contracts, assignments and corporate records prepared by any officer, director, agent or employee of Henkel & Cie. (hereinafter referred to as Henkel), Deutsche Hydrierwerke A. G. (hereinafter referred to as Hydrierwerke), Boehme Fettchemie G.m.b.H. and its predecessor company H. Th. Boehme A. G. (both hereinafter referred to as Boehme), and Unichem Chemikalien Handel A. G. (hereinafter referred to as Unichem), from January 1, 1932, to date which in any way relate, directly or indirectly, to:

i. Negotiations with E. I. duPont de Nemours & Co. (hereinafter referred to as duPont) and Proctor & Gamble Company;

ii. The execution of contracts or license agreements with duPont and Proctor & Gamble and all references to the fields covered by the contracts or agreements and the compliance with the terms thereof;

iii. The formation of Hyalsol, the issuance, owner-

ship, transfer and acquisition of its stock; the issuance, ownership, transfer, acquisition, cancellation, discharge and payment of its bonds, notes and other indebtedness, and contracts between Hyalsol and Unichem;

iv. The payment of United States taxes by Hyalsol;

v. The default by Hyalsol in the payment of its obligations to Unichem and Gottfried Weiss;

vi. The negotiations in December, 1939, at Zurich, Switzerland.

vii. Reports to the German Government concerning Hyalsol, its stock, bonds and notes;

viii. Reports to the Swiss Government concerning Hyalsol, its stocks, bonds and notes, and Unichem;

ix. Reports to the British, United States and French Governments concerning Hyalsol;

x. The deposit of Hyalsol stock in safe deposit boxes in the United States; and

xi. Nelson Littell and Lewis H. Marks.

3. Memoranda, reports, statements and correspondence prepared and testimony given by Willi Feldrappe during the period from January 1, 1935 to date, which concern, directly or indirectly:

i. The ownership, location and custody of Hyalsol stock, bonds and notes;

ii. The relationship between Hyalsol, Henkel, Hydrierwerke, Boehme, Unichem, Proctor & Gamble, duPont, Littell, Marks and Weiss;

iii. The conferences and negotiations which took place in Zurich, Switzerland, in December, 1939;

iv. The ownership, transfer and discharge of Hyalsol bonds and notes;

v. Conferences with and statements and reports to officials of the German and Swiss Governments with respect to Hyalsol and its affairs;

vi. Conferences with and statements made to the British, French and United States government officials with respect to Hyalsol and its affairs; and

vii. The two safe deposit boxes in the United States where at various times during the period January 1, 1932 to January 1, 1941 stock of Hyalsol was located;

viii. Nelson Littell and Dr. Lewis H. Marks.

4. Memoranda, reports, statements and correspondence prepared and testimony given during the period from January 1, 1932 to date by Walter Schrauth, Hans Ackerman, Fritz Boening, Heinrich G. Bertsch, Jost Henkel, Fritz Pfund, Walter Kling, Gottfried Weiss and Hans Hotz, which concern directly or indirectly:

i. The negotiations leading up to and execution of license agreements between Hydrierwerke, Boehme, Unichem, duPont and Proctor & Gamble;

ii. The formation of Hyalsol in 1932;

iii. The assignment to Hyalsol of the Proctor & Gamble and duPont license agreements and patents mentioned in said license agreement, the issuance by Hyalsol of its notes and bonds to Unichem and contracts between Hyalsol and Unichem;

iv. The ownership of Hyalsol stock and the location of the stock certificates;

v. The relationship between Hyalsol, Henkel, Hydrierwerke, Boehme, Unichem, Proctor & Gamble, duPont, Littell, Marks and Weiss;

vi. The conferences and negotiations which took place in Zurich, Switzerland in December, 1939;

vii. The ownership, transfer, and discharge of Hyalsol bonds and notes;

viii. Conferences with and statements and reports to officials of the German and Swiss Governments with respect to Hyalsol and its affairs;

ix. Conferences with and statements made to the British, French and United States government officials with respect to Hyalsol and its affairs;

x. The two safe deposit boxes in the United States where at various times during the period from January 1, 1932 to January 1, 1941, stock of Hyalsol was located;

xi. Nelson Littell and Dr. Lewis H. Mark.

5. Memoranda, reports, statements and correspondence prepared and testimony given during the period from January 1, 1938 to date by Alice Kampe and Otto Debruss which concern directly or indirectly:

i. Conferences and negotiations which took place in Zurich, Switzerland in December, 1939.

ii. The transfer and discharge of Hyalsol bonds and notes.

iii. The ownership of Hyalsol stock.

iv. Conferences with and statements to the British, French and United States Government officials with respect to Hyalsol and its affairs.

v. Nelson Littell and Dr. Lewis H. Marks.

6. Correspondence, reports, memoranda, contracts, assignments and corporate records prepared by any officer, director or employee of duPont and Proctor & Gamble from January 1, 1932 to date which in any way concern directly or indirectly:

i. Negotiations and execution of contracts or license agreements with Henkel, Hydrierwerke, Boehme and Unichem.

ii. The formation of Hyalsol, the ownership of its stock, bonds and notes and the assignment of the contracts and license agreements to Hyalsol.

iii. The Proctor & Gamble loan to Hyalsol in the amount of $300,000.

iv. Reports and statements to and conferences with United States Government officials concerning Hyalsol.

v. Nelson Littell and Dr. Lewis H. Marks.

vi. Conferences and negotiations with Hyalsol, Unichem, Henkel, Hydrierwerke and Boehme relating to the fields covered by the license agreements and the enforcement of the terms and provisions of said agreements.

7. All correspondence, statements, reports and memoranda by Nelson Littell which in any way concern, directly or indirectly, Hyalsol and its affairs.

8. All correspondence, statements, reports and memoranda by Dr. Lewis H. Marks which in any way concern directly or indirectly, Hyalsol and its affairs.

9. All statements, reports, correspondence and memoranda which in any way concern directly or indirectly, Hyalsol and its affairs, Lewis H. Marks and Nelson Littell prepared by officials and employees of the German Government and of the German Reichsbank or obtained from the files of said German Government and German Reichsbank.

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CHARLES ELMORE CROPLEY

No. 435

In the Supreme Court of the United States

OCTOBER TERM, 1950

BOWMAN DAIRY COMPANY ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND WILLIS L. HOTCHKISS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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v.

UNITED STATES OF AMERICA AND WILLIS L. HOTCHKISS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (R. 128) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1950 (R. 140). The petition for writ of certiorari was filed on December 6, 1950. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254.

QUESTION PRESENTED

Whether the scope of pre-trial discovery against the United States permitted by Rule 16 of the

Federal Rules of Criminal Procedure may be expanded by use of a subpoena *duces tecum* under Rule 17 (c) requiring pre-trial production of all documents, not privileged, obtained by Government counsel in any manner other than by seizure or process in the course of the grand jury investigation and of preparation for trial if such documents were presented to the grand jury, or are to be offered as evidence on the trial or "are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."

FEDERAL RULES INVOLVED

Federal Rules of Criminal Procedure (18 U. S. C. foll. 687):

RULE 16. DISCOVERY AND INSPECTION

> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

RULE 17. SUBPOENA

* * * * *

(c) For Production of Documentary Evidence and of Objects.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

This proceeding arose out of a criminal case charging a violation of the Sherman Act. The present petition seeks review of a judgment of the court of appeals reversing an order of the United States District Court for the Northern District of Illinois, Eastern Division (Judge Barnes), committing respondent Hotchkiss for contempt of court. Petitioners are the defendants in the criminal case. Respondent Hotchkiss is Chief of the Midwest Office of the Antitrust Division of the Department of Justice. The contempt order resulted from respondent Hotchkiss'

refusal, on instructions of the Attorney General, to comply with an order of the district court requiring him to make available to the petitioners for pre-trial inspection all documents of the character described in a subpoena *duces tecum* issued purportedly under the authority of Rule 17 (c) of the Federal Rules of Criminal Procedure.

The indictment in this case, returned on July 30, 1948 (R. 2), charges eight corporations, all engaged in the milk business in the greater Chicago area, and nine officers of these corporations, with conspiring to allocate among themselves wholesale fluid milk customers in the Chicago area and sales of fluid milk to certain public institutions therein, in violation of Section 1 of the Sherman Act (R. 3–9). Motions by the petitioners to dismiss the indictment were denied by the district court on April 13, 1949 (R. 117).

On June 13, 1949, the trial date not having been set (R. 117), petitioners made two pre-trial motions aimed at securing access to documentary material in the Government's possession relating to this case. One of these motions, made under Rule 16 of the Criminal Rules, requested an order directing the Government to produce for petitioners' inspection the documents which the Government had obtained from the petitioners or other persons by seizure or process (R. 28-46). The other, made under Rule 17 (c), was for an order requiring the Government to produce for petitioners' inspection documents obtained by the

Government by means other than by seizure or process (R. 10–27).

The parties having agreed on the form of an order for inspection of documents pursuant to Rule 16, such an order was entered by the court on November 7, 1949 (R. 52, 64). The order required the Government to permit defendants to inspect and copy the documents obtained by the Government by subpoenas *duces tecum* issued in connection with the grand jury investigation which had resulted in the petitioners' indictment (R. 64). Attached to the order was an exhibit listing 56 such subpoenas (R. 65–69). The Government did not resist this order under Rule 16.

The motion for an order under Rule 17 (c) was presented to the district court at a hearing on November 7, 1949. The court took the position that Rule 17 (c) applied, and that the petitioners' rights to discovery were not confined to those given by Rule 16 (R. 52–55). The court accordingly entered on that date an order under Rule 17 (c) (R. 69–71) directing the Government to produce for the petitioners' inspection the books, papers and documents designated in a subpoena *duces tecum* which the petitioners had filed and served on November 1, 1949 (R. 48–50), addressed to respondent Hotchkiss and Otto Kerner, Jr., United States Attorney for the Northern District of Illinois. The subpoena, a copy of which was attached to the court's order (R. 70–71), directed production of:

all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or paper solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants.

The Government subsequently moved to quash the subpoena issued under Rule 17 (c), and to set aside the order of November 7, 1949 directing compliance with this subpoena (R. 72–73) on the ground, *inter alia,* that the right of defendants in criminal proceedings to obtain access to documents and other papers in the custody of attorneys for the Government is limited to the rights granted to such defendants by Rule 16 of said Rules.

On January 4, 1950, the court denied the Government's motion to quash (R. 83–84). Respondent Hotchkiss thereupon submitted to the court a written statement, in the form of an affidavit, which averred that all of the documents, etc., which the court had ordered produced were in his custody (R. 84–85). The statement, after summarizing the reasons for the Government's contention that the subpoena and order were not authorized by Rule 17 (c), stated that respondent Hotchkiss, acting on the advice and instructions of the Attorney General and the Assistant Attorney General in charge of the Antitrust Division, respectfully declined to comply with the court's order of November 7, 1949 (R. 86–87).

On January 5, 1950, the court entered an order finding respondent Hotchkiss guilty of contempt of the court in refusing to produce the documents designated in the subpoena and in refusing to comply with the court's order of November 7, 1949 (R. 99). The order therewith committed respondent Hotchkiss to the custody of the Attorney General to be held until he should comply with the provisions of the subpoena *duces tecum* and should obey the court's order of November 7, 1949, or until he should be discharged from custody by due process of law (*ibid.*).[1]

[1] On the same day the court below admitted respondent Hotchkiss to bail on his own recognizance (R. 102).

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The court below reversed the contempt order. In an opinion by Judge Duffy (R. 128), the court held that the Government's motion to quash the subpoena and to set aside the order of compliance should have been granted (R. 134). Judge Duffy said (R. 134):

> Although the language of Rule 17 (c) is broad, the rule is only one in an integrated group for the regulation of procedure in criminal cases in federal courts. It must be read with the other rules in mind, and particularly Rule 16. It should not be construed so that the carefully drawn limitations in Rule 16 become meaningless. It is our view that Rule 17 (c) provides for the traditional type of trial subpoena, although as a matter of convenience it may be made returnable before the actual date of trial. However, it may not be converted into an unrestricted pre-trial discovery device.

Chief Judge Major filed a separate concurring opinion in which he expressed his agreement "with the result reached by Judge Duffy and with his reasoning" but stated that "I would go further and hold that Rule 17 (c) imposes no obligation upon parties, either the defendants or the government, including their attorneys" (R. 134).

Judge Lindley, dissenting, was of the view that the effect of the court's decision was to render

Rule 17 (c) a nullity as applied to an attorney for the Government (R. 139).

ARGUMENT

1. The court below[2] correctly held that the subpoena *duces tecum* and order to comply therewith directed to respondent Hotchkiss by the district court were beyond the authority conferred by Rule 17 (c) of the Federal Rules of Criminal Procedure. If Rule 17 (c) were construed to authorize the type of subpoena here issued it would permit precisely what Rule 16, the discovery rule, forbids.

The pre-trial discovery procedure established by the Criminal Rules is set forth in Rule 16, which is entitled "Discovery and Inspection" (*supra*, p. 2). Under that rule the court, at any time after the filing of the indictment or information, may order discovery against the attorney for the Government as to certain specified categories of documents and other materials upon a showing "that the items sought may be material to the preparation" of the defense and "that the request is reasonable." The rule provides for such discovery (i. e., inspection and copying) as to documents and other materials (1) obtained from or belonging to the defendant or (2) obtained from others by seizure or process.

[2] We refer to Judge Duffy's opinion as that of the court since Chief Judge Major concurred with the "result" and "reasoning" of Judge Duffy (R. 134).

The history of the Criminal Rules reveals that early drafts of Rule 16 were patterned after Civil Rule 34 which embodies the principle of broad pre-trial discovery—one of the main innovations of the Civil Rules. The limitations on discovery which were introduced into the final draft which became Criminal Rule 16 represent a deliberate rejection of the broad discovery principle in criminal cases.[3] See *Shores* v. *United States*, 174 F. 2d 838, 844 (C. A. 8).

Petitioners have utilized Rule 16 to obtain access to all documents in the custody of the attorney for the Government—respondent Hotchkiss—which had been obtained from or belonged to the petitioners, or had been obtained from other persons by seizure or by process. Petitioners, however, sought broader discovery. The disputed subpoena *duces tecum* calls for the documents ob-

[3] Compare Federal Rules of Criminal Procedure, Preliminary Draft (1943) Rule 19, and *id.*, Second Preliminary Draft (1944) Rule 18, with Civil Rule 34. And compare note of Advisory Committee to Draft Rule 18 of the Second Preliminary Draft, *id.*, pp. 94–95, with note to Rule 16. The notes to the earlier drafts of this rule cited Civil Rule 34, apparently as the source of the rule; in the note to Rule 16 all reference to the civil rules is eliminated. The note to Rule 16, as adopted, describes it as permitting defendants to inspect impounded documents belonging to them, and also permitting inspection of objects and documents obtained from others by seizure or by process "on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution."

tained by Government counsel in any manner other than by seizure or process, if such materials "are relevant to the allegations or charges contained in said indictment" (*supra*, p. 6).[4]

Petitioners do not contend that the disputed subpoena is authorized by Rule 16. Their contention is that the language of Rule 17 (c) which provides that the court may direct production of subpoenaed documents "prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books [etc.] * * *, to be inspected by the parties and their attorneys" (*supra*, p. 3) confers discretion upon the district court to permit pre-trial inspection of such materials as it deems appropriate. There are several insuperable difficulties with this contention.

First, as the court below pointed out (R. 134), Rule 17 (c) "is only one in an integrated group for the regulation of procedure in criminal cases in federal courts. * * * It should not be construed so that the carefully drawn limitations in Rule 16 become meaningless." It seems too clear to require extended discussion that the framers of the Rules would not have created in Rule 16 a privilege of discovery by motion for production

[4] The only categories of materials except from the subpoena are (a) the work product of Government counsel, (b) what might be generally characterized as statements of Government informants, and (c) materials obtainable under Rule 16.

carefully limited to documents taken from or belonging to the defendant, or taken from others by seizure or process, and at the same time have created in Rule 17 (c) an unlimited privilege of pretrial discovery by the subpoena route. Nor would the framers have conditioned the privilege of discovery in Rule 16 upon a showing by the defendant that the items sought may be "material to the preparation of his defense" if at the same time Rule 17 (c) authorized unlimited discovery by subpoena, subject only to a motion to quash on the ground that "compliance would be unreasonable or oppressive." Petitioners seek to meet these arguments by pointing out that the power of the court to order pretrial production under Rule 17 is entirely discretionary (Pet. 17–18). The short answer is that the pretrial discovery permitted by Rule 16 is also discretionary[5] but the power of the court to order such discovery is subject to express limitations. The framers obviously could not have intended by Rule 17 to confer unlimited discretion to render nugatory the express limitations on discretionary power contained in Rule 16.

Second, the sentence in Rule 17 (c) upon which petitioners rely does not, if read in context, suggest the creation of a broad discovery device. Rule 17 (a) provides for subpoenas *ad testifi-*

[5] Not only does Rule 16 provide that the court "may" (rather than "shall") order discovery, but it also requires a showing that "the request is reasonable" and empowers the court to "prescribe such terms and conditions as are just."

candum;[6] Rule 17 (c) provides that the subpoena "may also command the person to whom it is directed" to produce designated documents or other materials. When the two subdivisions are read together it is apparent that the latter relates to the traditional trial subpoena *duces tecum* by means of which witnesses may be required to bring documents with them to the trial or other proceeding. The provision for production of documents "prior to the trial or prior to the time when they are to be offered in evidence" plainly refers to evidentiary material which is to be offered at the trial by the party subpoenaing it, not to all materials in the hands of the opposing party "whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants" (cf. instant subpoena, *supra,* p. 6). The rule cannot reasonably be read as authorizing the court to require a general disclosure by a party of its entire case. A provision which in terms merely relates to the time at which a subpoena *duces tecum* is returnable and the time at which the parties may be permitted to exercise the time-honored privilege of inspection of documentary materials prior to their actual receipt in evidence,

[6] "A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed *to attend and give testimony at the time and place specified therein.* * * *" [Emphasis supplied.]

should not be construed as a *carte blanche* authorization of dragnet pretrial discovery.

Finally, the history of the Criminal Rules shows that the provision on which petitioners rely was never conceived as a discovery provision. The genesis of Rule 17 (c) is found in Rule 20 of the Preliminary Draft (1943). The Advisory Committee's note to the draft rule states that the rule "applies to subpoenas *ad testificandum* and subpoenas *duces tecum* issued for attendance at a trial or hearing in the district courts, at hearings before United States commissioners, or to take depositions."[7] There is no suggestion that an auxiliary discovery device was contemplated. On the contrary, the sentence permitting the court to require production of documents prior to trial or prior to the time at which they are to be offered in evidence is explained as follows:[8]

> The last sentence provides for a method by which the court may permit either side to inspect subpoenaed documents or objects under the supervision of the court. It is inserted *in the interests of fairness* and for the *purpose of preventing delay during the trial,* particularly in cases where numerous documents may have been subpoenaed. [Emphasis supplied.]

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[7] Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 106. As there are no substantial changes in the language of the subdivision as it appears in the final rule, the notes to the original draft are apposite.

[8] *Id.*, pp. 107–108.

The construction of Rule 17 (c) urged by petitioners thus is not only inconsistent with the express limitations on pre-trial discovery found in Rule 16, but the very sentence of the rule upon which they rely was designed for other purposes. Rule 17 (c) provides for conventional trial process, with the single novel element that documentary evidence may be required to be produced prior to the time it is to be offered in evidence, even though that time be prior to trial. The instant subpoena, calling as it does for substantially all of the Government's documentary material, whether evidentiary or not, clearly cannot be justified under the authority of Rule 17 (c).

The construction of Rule 17 (c) adopted by the court below renders it harmonious with Rule 16, as the framers of the Rules must have intended. That construction also preserves unimpaired the important function of Rule 17 (c). The court did not, as petitioners imply,[9] hold that a defendant in a criminal case may never inspect, in advance of trial, specifically identified documents obtained by the Government by means other than seizure or process. It held invalid an order for compliance with a subpoena which would in effect have required the Government to disclose its entire case—to the extent contained in documentary form. But this holding does not mean that a subpoena for specific evidentiary material to be offered by the defense

[9] See Question I in petitioners' statement of Questions Presented (Pet. 2).

at the trial would be invalid if the material subpoenaed were beyond the discovery provisions of Rule 16.[10] The court below has not weakened the production-before-trial provision of Rule 17 (c) (cf. dissenting opinion, R. 139). It has merely in effect held that what is actually a trial subpoena may not be utilized for a broad fishing expedition into the opposing party's case.

2. There is no conflict between the decision below and that in *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2). The holding of that case was that a petition for leave to file a petition for a writ of mandamus should be denied. The bulk of the court's brief *per curiam* opinion was devoted to a discussion of the impropriety of the issuance of the extraordinary writ where the challenged action of the lower court is not subject to the appellate jurisdiction of the court of appeals. It is true that the *per curiam* opinion stated that "The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the court's jurisdiction" (171 F. 2d at 644). At most this statement imports a holding that for the purpose of mandamus the court would limit its inquiry to the ques-

[10] Thus in a murder prosecution the Government might have possession of the alleged murder weapon which the defense desired to offer at the trial. A subpoena under Rule 17 (c) requiring production of the weapon might validly be ordered returnable prior to trial, although the weapon was not taken from the defendant or others by seizure or process.

tion whether a district court has the power to issue a subpoena *duces tecum*. As the court below noted (R. 134), "the opinion cannot be construed as a considered determination as to the character of documents which a subpoena may include or the purposes for which it may issue."

With the single exception of the opinion of Judge Barnes, which the court below reversed in the instant case, every reported case where the issues here involved are discussed is in accord with the decision below.[11] *United States* v. *Maryland & Virginia Milk Producers Association*, 9 F. R. D. 509 (D. D. C.); *United States* v. *Hiss*, 9 F. R. D. 515 (S. D. N. Y.); *United States* v. *Bramfield*, 85 F. Supp. 696 (W. D. La.). In the *Maryland & Virginia Milk Producers Association* case, *supra*, defendants sought a subpoena *duces tecum* directing the Government to produce all documents which it had obtained from any person

[11] In the unreported case of *United States* v. *Norman Littell and Lewis H. Marks* (S. D. N. Y., 1948), in which leave to file mandamus was denied in *United States* v. *Bondy*, *supra*, the grounds on which the district court relied in reaching its decision cannot be ascertained since it filed no opinion. In the unreported opinion of November 10, 1949, in the case of *United States* v. *Hiss* (No. C128–402, S. D. N. Y.), it appears that a subpoena for certain specific documents had been served upon the Secretary of State and that he had complied with the subpoena to the extent of forwarding the documents to the court. In denying a motion to quash the district court stressed the fact that the subpoena had not been served on the attorney for the Government.

not a party to the proceeding whether by process or not. In denying the request, the court stated (9 F. R. D. at 510):

> The purpose of this provision is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial. It is not intended as a discovery provision.

And see *United States* v. *Brumfield, supra,* at 707; *United States* v. *Hiss, supra,* at 516.

Petitioners' contention that the interpretation placed upon Rule 17 (c) by the court below deprives defendants in criminal cases of "basic privileges which are deeply rooted in the American common law" (Pet. 11–12) is also unsound. Pre-trial disclosure of any kind of the prosecution's evidence was unheard of at early common law.[12] Certainly neither the prior federal practice nor the overwhelming weight of state authority (both before and since the Criminal Rules were adopted) recognized any broad right of pre-trial discovery in criminal cases.[13] It may well

[12] *Rex* v. *Holland*, 4 T. R. 691, 100 E. R. 1248; see *Shores* v. *United States*, 174 F. 2d 838, 843 (C. A. 8); *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 385, 135 N. W. 1128, 1129; Wigmore, *Evidence* (3rd ed., 1940) § 1859g. For a searching review of authorities in this field, see Cardozo, Ch. J., in *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24, 156 N. E. 84.

[13] *United States* v. *Rosenfeld*, 57 F. 2d 74 (C. A. 2), certiorari denied, 286 U. S. 556; *Massie* v. *People*, 82 Colo. 205, 258 Pac. 226; *Padgett* v. *State*, 64 Fla. 389, 59 So. 946;

have been this very lack of precedent in favor of pre-trial disclosure of evidence that led the framers of the Rules to refrain from following the pattern established by the Civil Rules. See *Shores* v. *United States*, 174 F. 2d 838, 844 (C. A. 8); cf. Advisory Committee's Note to Rule 16.

The limited "discovery" permitted by some courts at common law was entirely different from what the petitioners demand in the instant case. It was complementary to the indictment and bill of particulars, and designed to insure that a defendant be properly informed of the charges against him, not to give him the details of the prosecution's evidence. Ordinarily it was granted only when the defendant showed a real need to inspect par-

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Newton v. *State*, 21 Fla. 53; *People* v. *Schallman*, 295 Ill. 560, 129 N. E. 569; *Weer* v. *State*, 219 Ind. 217, 36 N. E. 2d 787; *State* v. *Jeffries*, 117 Kan. 742, 232 Pac. 873; *Wendling* v. *Comm.*, 143 Ky. 587, 137 S. W. 295; *State* v. *Williams*, 211 La. 782, 30 So. 2d 834; *Comm.* v. *Noxon*, 319 Mass. 495, 535, 66 N. E. 2d 814, 839; *Comm.* v. *Jordan*, 207 Mass. 259, 93 N. E. 809; *People* v. *Kuberacki*, 310 Mich. 162, 16 N. W. 2d 703; *State ex rel. Page* v. *Terte*, 324 Mo. 925, 25 S. W. 2d 459; *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *Hameyer* v. *State*, 148 Neb. 798, 29 N. W. 2d 458; *State* v. *Bunk*, 63 A. 2d 842 (Cty. Ct. N. J.); *People* v. *Gatti*, 167 Misc. 545, 4 N. Y. S. 2d 130; *State* v. *Di Noi*, 59 R. I. 348, 195 Atl. 497; *May* v. *State*, 129 Tex. Cr. R. 2, 83 S. W. 2d 338; *Abdelt* v. *Comm.*, 173 Va. 458, 2 S. E. 2d 293; *State* v. *Payne*, 25 Wash. 2d 407, 171 P. 2d 227; *Santry* v. *State*, 67 Wis. 65, 30 N. W. 226. And see 2 Wharton, *Evidence in Criminal Cases* (11th ed., 1935) 1311-12; 23 C. J. S., Criminal Law, § 955; 17 Am. Jur., Discovery, § 25.

ticular identifiable objects of evidence. *United States* v. *Burr*, 25 Fed. Cas. 30 (C. C. D. Va.) (Pet. 12–13),[14] is an early example of this rule. *People* v. *Gerold*, 265 Ill. 448, 107 N. E. 165 (Pet. 13), is another.[15] Numerous other examples may be

[14] The history of the Rules shows that the *Burr* rule was rejected by the framers when the early, broad discovery proposals were discarded in favor of the present rule. Compare Advisory Committee's notes to the broad discovery provision embodied in the early drafts of the rules (Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 103; *id.* Second Preliminary Draft (1944), pp. 94–95) with the note to Rule 16. In any event, the subpoena in the *Burr* case does not bear the slightest resemblance to that in the case at bar. In that case Chief Justice Marshall issued a subpoena for a specific identifiable object of evidence, "a paper which the accused believed to be essential to his defense, which may, for aught that now appears, be essential" (25 Fed. Cas. at 37; Appellees' Br. 25). The present subpoena, on the other hand, represents an effort to secure disclosure of substantially all the documents, evidentiary or not, in the Government's possession.

[15] In the *Gerold* case a defendant was permitted to inspect books and records of transactions of his former public office where the charges against him were founded on these papers. It involved, as did *Burr*, a degree of pre-trial discovery. But there, as in *Burr*, the discovery was restricted to specific identifiable evidence thought by the court to be of potentially crucial importance to the preparation of the defense and which, moreover, was evidence in the category of "public records."

[16] *United States* v. *Warren*, 53 F. Supp. 435 (D. Conn.); *United States* v. *Rich*, 6 Alaska 670; *Daly* v. *Dimock*, 55 Conn. 579, 12 Atl. 405; *State* v. *Lowery*, 160 La. 811, 107 So. 583; *State* v. *Haas*, 188 Md. 63, 51 A. 2d 647; *People* v. *Gatti*, 167 Misc. 545, 4 N. Y. S. 2d 130; *People* v. *Bellows*, 1 How. Pr. N. S. 149 (N. Y. O. & T.); *State* v. *Morrison*, 175 Wash. 656, 27 P. 2d 1065. And see *Cramer* v. *State*, 145 Neb. 88, 15 N. W. 2d 323.

found.[18] Each is a case where a court has determined that it would be unjust to deny to the defendant access to some specific important piece of evidence upon which the entire defense might hinge, or involving a document which in itself was the basis of the prosecution. None is a case in which the defendant simply wished to know the general content of the prosecution's evidence against him.

CONCLUSION

For the foregoing reasons the decision below is correct, there is no conflict, and the petition for writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 435

BOWMAN DAIRY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND WILLIS L. HOTCHKISS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (R. 128) is reported at 185 F. 2d 159.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1950 (R. 140). The petition for writ of certiorari was filed on December 6, 1950, and granted on January 15, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether Rule 17 (c) of the Federal Rules of Criminal Procedure authorizes a district court to

order pre-trial production of all documents obtained by Government counsel, in any manner other than by seizure or process, in the course of the grand jury investigation and of preparation for trial if such documents were presented to the grand jury, or are to be offered as evidence on the trial or are relevant to the allegations or charges contained in said indictment, "whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."

FEDERAL RULES INVOLVED

Federal Rules of Criminal Procedure:

> RULE 16. DISCOVERY AND INSPECTION.—Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.
>
> RULE 17. SUBPOENA.—(a) For Attendance of Witnesses; Form; Issuance.

A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

* * * * * *

(c) For Production of Documentary Evidence and of Objects.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

This proceeding arose in a criminal case based upon an indictment charging a violation of the

Sherman Act. Petitioners are the defendants named in the indictment. They seek reinstatement of an order, reversed by the court below, which committed respondent Hotchkiss for contempt of court. The contempt order resulted from the refusal of respondent Hotchkiss, the Chief of the Midwest Office of the Antitrust Division of the Department of Justice, to comply with an order of the district court requiring him to make available to the petitioners for pretrial inspection all documents and other materials of the character described in a subpoena *duces tecum* issued under the purported authority of Rule 17 (c) of the Federal Rules of Criminal Procedure.

The indictment in this case, returned on July 30, 1948 (R. 2), charges eight corporations, all engaged in the milk business in the greater Chicago area, and nine officers of these corporations, with conspiring to allocate among themselves wholesale fluid milk customers in the Chicago area and sales of fluid milk to certain public institutions therein, in violation of Section 1 of the Sherman Act (R. 3–9). Motions by the petitioners to dismiss the indictment were denied by the district court on April 13, 1949 (R. 117).

On June 13, 1949, the trial date not having been set (R. 117), petitioners made two pretrial motions aimed at securing access to documentary material in the Government's possession relating to this case. One of these motions, made under Rule 16 of the Criminal Rules, requested an order

directing the Government to produce for petitioners' inspection the documents which the Government had obtained from the petitioners or other persons by seizure or process (R. 28–46). The other, made under Rule 17 (c), was for an order requiring the Government to produce for petitioners' inspection documents obtained by the Government by means other than by seizure or process (R. 10–27).

The parties having agreed on the form of an order for inspection of documents pursuant to Rule 16, such an order was entered by the court on November 7, 1949 (R. 52, 64). The order required the Government to permit defendants to inspect and copy the documents obtained by the Government by subpoenas *duces tecum* issued in connection with the grand jury investigation which had resulted in the petitioners' indictment (R. 64). Attached to the order was an exhibit listing 56 such subpoenas (R. 65–69).

The motion under Rule 17 (c) sought production of materials covered by a subpoena *duces tecum* which petitioners had served upon respondent Hotchkiss and Otto Kerner, Jr., the United States Attorney for the Northern District of Illinois. The subpoena directed production of (R. 71):

> all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or paper

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solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants.

On November 7, 1949, a hearing was held before Judge Barnes on petitioners' motion under Rule 17 (c). At this hearing, counsel for the Government undertook to state the Government's legal objections to the subpoena[1] and at the same time reiterated a previous offer to make available to the petitioners certain categories of the evidentiary materials in the Government's possession (R. 56). The court took the position that the subpoena was proper; and it entered an order requiring production for the petitioners' inspec-

[1] The Government did not complete the presentation of its objections because discussion of them was terminated by the trial court (R. 55).

tion of the "books, papers, and documents designated in the subpoena" (R. 69).

Thereafter, on November 28, 1949, the Government moved to quash the subpoena and to set aside the order directing compliance with it (R. 72, 73). The Government contended, *inter alia*, that the right of defendants in criminal proceedings to obtain access to materials in the custody of attorneys for the Government is limited to the rights granted by Rule 16 of the Criminal Rules, and that the court had acted outside its jurisdiction in ordering production of the subpoenaed material.[2]

On January 4, 1950, the court denied the Government's motion to quash (R. 83–84). Respondent Hotchkiss thereupon submitted to the court a written statement, in the form of an affidavit, which averred that all of the documents and other materials which the court had ordered produced were in his custody (R. 84–85). The statement, after summarizing the reasons for the Government's contention that the subpoena and order were not authorized by Rule 17 (c), stated that respondent Hotchkiss, acting on the advice and instructions of the Attorney General and the Assistant Attorney General in charge of the Antitrust Division, respectfully declined to com-

[2] The Government also contended that the attorney for the Government was not subject to subpoena under Rule 17 (c). That contention was abandoned in the court of appeals and is not made here.

ply with the court's order of November 7, 1949 (R. 86–87).

On January 5, 1950, the court entered an order finding respondent Hotchkiss guilty of contempt of the court in refusing to produce the documents designated in the subpoena and in refusing to comply with the court's order of November 7, 1949 (R. 99). The court committed respondent Hotchkiss to the custody of the Attorney General to be held until he should comply with the provisions of the subpoena *duces tecum* and should obey the court's order of November 7, 1949, or until he should be discharged from custody by due process of law (*ibid.*).[3]

The court below reversed the contempt order. In an opinion by Judge Duffy, the court held that the Government's motion to quash the subpoena and to set aside the order of compliance should have been granted (R. 128, 134). The court reviewed the history of the successive drafts of the discovery rule, and stated (R. 132):

> Considering the history of Rule 16 which shows the evolution from the broad terms of its first draft to its final restrictive and limited terms, it is difficult to believe that the framers of the rule intended to authorize discovery and inspection of broad scope under Rule 17 (c) pertaining to subpoena

[3] On the same day the court below admitted respondent Hotchkiss to bail on his own recognizance (R. 102).

> which was expressly prohibited by Rule 16 which is the rule intended to cover discovery and inspection. It does not make sense to have created in one rule a privilege of discovery limited to documents and papers belonging to the defendant or taken from others by seizure or process and at the same time to create in Rule 17 (c) an almost unlimited right of discovery by use of the subpoena provisions.

With respect to the proper function of Rule 17 (c), the court said (R. 134):

> It is our view that Rule 17 (c) provides for the traditional type of trial subpoena, although as a matter of convenience it may be made returnable before the actual date of trial. However, it may not be converted into an unrestricted pre-trial discovery device.

Chief Judge Major filed a separate concurring opinion in which he expressed his agreement "with the result reached by Judge Duffy and with his reasoning" (R. 134) but in addition expressed the view that Rule 17 (c) is applicable only to witnesses other than parties or their attorneys, so that respondent Hotchkiss, as attorney for the Government, could not be subpoenaed in this case (R. 134-138).

Judge Lindley, dissenting, was of the view that the effect of the court's decision was to render Rule 17 (c) a nullity (R. 139).

SUMMARY OF ARGUMENT

I

The subpoena *duces tecum* and order to produce exceed the limits of pretrial discovery established by Rule 16 of the Rules of Criminal Procedure. Rule 16 permits discovery of materials taken from or belonging to the defendant or obtained from others by seizure or process. The instant subpoena requires production of materials irrespective of the sources from which they were obtained. The history of Rule 16 shows that the limitations there contained were not inadvertently introduced. Broad pretrial discovery in criminal cases was not permitted in pre-rule practice. Early drafts of the discovery rule were patterned after the broad discovery permitted under the Civil Rules but such an innovation was discarded in favor of the restricted discovery privilege embodied in Rule 16.

The Criminal Rules should be interpreted as an integrated and harmonious whole. If the present subpoena were permitted under Rule 17 (c), it would render the carefully drawn limitations of Rule 16 nugatory, and render Rule 16 itself superfluous.

II

The language and history of Rule 17 (c) show that it is not intended as a pretrial discovery device, and may not properly be utilized to expand the scope of permissible discovery under

Rule 16. Rule 17 (c) contemplates a traditional trial subpoena *duces tecum* with the single novel element that the materials subpoenaed may be ordered produced before trial. But this pretrial production provision does not convert the subpoena from a mechanism for obtaining production of specific, described evidence for use at the trial to a device for conducting a general exploration into the opposing party's files. The present subpoena is deliberately cast in the latter form. It seeks production of the Government's documentary materials whether or not evidentiary in character. The limits on pretrial discovery established by Rule 16 cannot be thus circumvented. Rule 17 (c) may not be used by either defendants or the Government in the manner here attempted.

ARGUMENT

INTRODUCTION

This case involves the character and limitations of pre-trial discovery under the Federal Rules of Criminal Procedure. It is not, as petitioners imply (Petitioners' Br. 39–41), a privilege case in disguise. There is no question of governmental privilege at issue in these proceedings, nor is there any contention that Rule 17 (c), the rule under the asserted authority of which the present subpoena was issued, is to be interpreted differently as applied to the Government than as to defendants. The Government's contention here is that the subpoena and order to produce which were directed to respondent Hotchkiss were

not authorized by the Criminal Rules. The subpoena and order require production of materials as to which it is conceded that discovery has not been authorized by Rule 16, the discovery and inspection rule. We contend that authority for the subpoena and order cannot properly be based upon Rule 17 (c), which provides for subpoenas *duces tecum*. Our contention would apply equally to attempted use by the Government of Rule 17 (c) as a pre-trial discovery device.

Resolution of the issues here presented requires consideration of Rules 16 and 17 (c) and of their relationship with each other. The Federal Rules of Criminal Procedure, which were designed and promulgated as an integrated system for the regulation of criminal cases in federal courts, should not be treated as a collection of unrelated statutes. The rule specifically dealing with discovery cannot properly be ignored in considering the validity of a construction of the subpoena rule which would result in broad pre-trial discovery (cf. Petitioners' Br. 13).[4]

The decision of the court below interprets Rules 16 and 17 (c) in a manner consistent with

[4] In the construction of statutes, it is well settled that particular provisions must be looked at, not in isolation, but in the setting of the related provisions which accompany them. All sections of a statute must be read "as an integrated whole." *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U. S. 480, 488; see *Duparquet Co.* v. *Evans*, 297 U. S. 216, 218. Compare *Hickman* v. *Taylor*, 329 U. S. 495, 505: "The deposition-discovery rules [of the Rules of Civil Procedure] create integrated procedural devices."

the purposes of each, but at the same time avoids placing them at cross purposes. It recognizes that the limits of pretrial discovery are established by Rule 16, which authorizes discovery as to documents and other materials (1) taken from or belonging to the defendant, or (2) obtained from others by seizure or process. And it holds that the area of discovery may not be enlarged through use of the subpoena *duces tecum* authorized by Rule 17 (c). The latter rule permits the court to require pretrial production for inspection purposes of subpoenaed documentary or other physical evidence. The court below correctly construed this provision as one for production of *evidentiary* material subpoenaed for actual use at the trial, rather than as a device for a virtually unrestricted pretrial exploration into the documentary materials in the possession of the Government, whether or not those materials are evidentiary in character, and however they may have been obtained.

In contrast to the harmonious interpretation placed upon the two rules by the court of appeals, petitioners would seize upon the general language of Rule 17 (c) to render meaningless the carefully drawn limitations found in the specific language of Rule 16. Petitioners have drawn an ingenious distinction in the purposes of the two rules as they interpret them, but they cannot point to any instance in which the limita-

tions of Rule 16 would be applicable and effective if Rule 17 (c) is given the construction they seek. More than this, they cannot point to any function that would be left to be performed by Rule 16 if Rule 17 (c) is to be an open sesame to the opposing party's files. As the court below remarked (R. 132): "It does not make sense to have created in one rule a privilege of discovery limited to documents and papers belonging to the defendant or taken from others by seizure or process and at the same time to create in Rule 17 (c) an almost unlimited right of discovery by use of the subpoena provisions."[5]

To sustain a construction of Rule 17 (c) which renders explicit limitations in the preceding rule nugatory, petitioners must demonstrate that the language of Rule 17 (c) or the expressed intention of its framers inescapably demands such a result. We propose to show that, on the contrary, petitioners' interpretation of Rule 17 (c) is not required by the language of that subdivision, and was not contemplated by the Advisory Committee which drafted the rules.

Petitioners argue that the Government has waived any objection to the challenged subpoena except that "founded on the restrictions of Rule

[5] And see the even more vigorous comment of Chief Judge Major, concurring (R. 137): "It borders on the absurd to argue for a construction of Rule 17 (c) which would confer on a defendant an unlimited right of production by the government when such right has been definitely limited in Rule 16 by exact and specific language."

16" (Petitioners' Br. 11, 36). Hence it is said that any reference to a "fishing expedition" is out of place (*ibid.*). This contention reveals a misunderstanding as to the fundamental nature of the Government's position and of the holding below. The court of appeals held, and we have contended throughout this proceeding, that Rule 16 defines the permissible scope of pre-trial discovery, and that this subpoena seeks pretrial discovery beyond the limits established by that rule. The characteristic which distinguishes the present subpoena from permissible trial process, and places it in the category of attempted discovery is the same characteristic which makes it partake of a fishing expedition. The subpoena seeks exploration, not particular described evidence.

I

THE SUBPOENA AND ORDER FOR PRODUCTION PROVIDE FOR PRETRIAL DISCOVERY OF A CHARACTER NOT AUTHORIZED BY RULE 16, THE DISCOVERY AND INSPECTION PROVISION OF THE CRIMINAL RULES

By the subpoena here in issue petitioners have sought to inspect substantially all papers and objects which the Government obtained in its investigation and preparation for trial, "whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."[6] Their avowed purpose is not to examine

[6] The subpoena excepts "memoranda prepared by Government counsel, and documents or paper solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews" (R. 71).

specified documents and objects for authenticity or the like. It is, as their brief makes clear, to be able "to know more exactly the issues in the cause" and to be aided "in unearthing other documents and records" (Petitioners' Br. 23). No matter how petitioners may seek to characterize it, what they have sought is pre-trial discovery of the broadest conceivable scope.

Accordingly, in considering whether petitioners can succeed in their attempt, we look first at that one of the Criminal Rules which in terms relates to pretrial discovery. Rule 16, entitled "Discovery and Inspection," provides as follows:

> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, *obtained from or belonging to the defendant or obtained from others by seizure or by process,* upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just. [Emphasis supplied.]

Under this provision the discovery which is authorized is limited as to the party who may invoke it, the person against whom it may be

invoked, and the materiality of the matters sought to be discovered. But the significant limitation for present purposes is the restriction upon the character of documents and other objects as to which the privilege of discovery may be granted. The portion of the rule italicized above restricts discovery to materials taken from or belonging to the defendant, or materials obtained from others by seizure or process. Thus discovery is available only as to materials in which the defendant had at least a possessory interest, or materials to which the defendant would normally have access but for the action of the prosecution in obtaining them first by governmental compulsion.

The scope of discovery to be permitted under Rule 16 is in considerable measure entrusted to the discretion of the district court. Thus the rule uses the permissive "may" rather than the mandatory "shall," and the court is to grant the request for discovery only if it is "reasonable." Moreover the order granting discovery "may prescribe such terms and conditions as are just." But there is no discretionary power in the trial court to *enlarge* discovery to include materials which are outside the explicitly defined categories listed in the rule. The rule obviously does not permit a trial court to order the attorney for the Government to make available for inspection documents which did not belong to the defendants, were not taken from

them, and were not obtained from others by seizure or process.' Yet this is precisely what the order of Judge Barnes here under review sought to accomplish. It requires pretrial production of substantially all documents relating to the case which are in the hands of the Government, irrespective of the persons from whom or manner in which they were obtained, and irrespective of whether the documents are evidentiary in nature.

The breadth of discovery which petitioners seek is virtually unlimited. If the Government has in its files documentary materials which have been voluntarily submitted to it by competitors or employees of petitioners or by members of the public in the course of the grand jury investigation leading to the indictment, or in the course of preparation for trial, and if the materials were presented to the grand jury, are to be offered as evidence, or are relevant to the allegations of the indictment, those materials must under this subpoena be produced whether or not they might constitute evidence of the guilt or innocence of the defendants. Thus the Government might be compelled to disclose to petitioners documents upon which it does not intend to rely and which are not evidentiary.

---

[1] The courts have unhesitatingly treated the listed categories of materials subject to discovery as exclusive. *Shores* v. *United States*, 174 F. 2d 838 (C. A. 8); *United States* v. *Black*, 6 F. R. D. 270 (N. D. Ind.); *United States* v. *Chandler*, 7 F. R. D. 365 (D. Mass.); *United States* v. *Brumfield*, 85 F. Supp. 696, 707 (W. D. La.).

Petitioners do not contend that the instant subpoena can be sustained under Rule 16. But petitioners seek to circumvent the limitations of that Rule by invoking the general language of the subpoena provision of Rule 17 (c). The review of the development of Rule 16 which follows shows beyond question that the limitations on discovery there contained represent the considered decision of the framers, and that in the process of arriving at that decision broad discovery of the type permitted under the Civil Rules was deliberately rejected. The history of the rule makes it clear that the Advisory Committee could not have intended to undo in Rule 17 what it so carefully did in Rule 16.

At early common law pre-trial disclosure of any of the prosecution's evidence was not permitted.[8] The limited "discovery" which in time came to be permitted by some courts was entirely different from what the petitioners demand in the instant case. Ordinarily it was granted only when the defendant showed a real need to

[8] *Rex* v. *Holland*, 4 T. R. 691, 100 E. R. 1248; see *Shores* v. *United States*, 174 F. 2d 838, 843 (C. A. 8); *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 385, 135 N. W. 1128, 1129; Wigmore, *Evidence* (3rd ed., 1940) § 1859g. For a searching review of authorities in this field, see Cardozo, Ch. J., in *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24, 156 N. E. 84.

inspect particular identifiable objects of evidence.[9] Indeed, in most jurisdictions the defendant is not even permitted to inspect, in advance of trial, his own written statement or confession or that of a co-defendant.[10] In special circumstances, or where statutes are construed to make the records public, defendants have been permitted to inspect official records of grand jury proceedings, coroner's inquests and special investigatory bodies, but here too the prevailing rule denies pre-trial discovery and

[9] See *e. g.*, *United States* v. *Burr*, 25 Fed. Cas 30 (C. C. D. Va.); *United States* v. *Warren*, 53 F. Supp. 435 (D. Conn.); *United States* v. *Rich*, 6 Alaska 670; *Daly* v. *Dimock*, 55 Conn. 579, 12 Atl. 405; *People* v. *Gerold*, 265 Ill. 448, 107 N. E. 165; *State* v. *Lowery*, 160 La. 811, 107 So. 583; *State* v. *Haas*, 188 Md. 63, 51 A. 2d 647; *People* v. *Gatti*, 167 Misc. 545, 4 N. Y. S. 2d 130; *People* v. *Bellows*, 1 How. Pr. N. S. 149 (N. Y. O. & T.); *State* v. *Morrison*, 175 Wash. 656, 27 P. 2d 1065. And see *Cramer* v. *State*, 145 Neb. 88, 15 N. W. 2d 323.

[10] *Shores* v. *United States*, 174 F. 2d 838 (C. A. 8) (under Rule 16); *United States* v. *Silverthorne*, 265 Fed. 853 (W. D. N. Y.); *United States* v. *Garsson*, 291 Fed. 646, 649 (S. D. N. Y.); *Metzler* v. *United States*, 64 F. 2d 203, 206 (C. A. 9); *United States* v. *Molasky*, 118 F. 2d 128 (C. A. 7), reversed on other grounds, 314 U. S. 513; *Silliman* v. *People*, 114 Colo. 130, 162 P. 2d 793; *State* v. *Kypis*, 7 W. W. Harr. 27, 179 A. 640 (Del. O. & T.); *Williams* v. *State*, 143 Fla. 826, 197 So. 562; *People* v. *Parisi*, 270 Mich. 429, 259 N. W. 127; *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *State* v. *Yeoman*, 112 Ohio St. 214, 147 N. E. 3, but cf. *State* v. *Cola*, 35 N. E. 2d 758 (Ohio App.); *Davis* v. *State*, 99 Tex. Cr. R. 517, 270 S. W. 1022; *Goode* v. *State*, 57 Tex. Cr. R. 220, 123 S. W. 597; *State* v. *Clark*, 21 Wash. 2d 774, 153 P. 2d 297. *Contra*, *State* v. *Dorsey*, 207 La. 928, 22 So. 2d 273. For the view that a court may, in its discretion, require the pre-trial production of a confession, see *State* v. *Haas*, 188 Md. 63, 51 A. 2d 647.

even discovery at the trial unless the materials are shown to be necessary to permit challenge of the validity of the proceedings themselves or for cross-examination purposes. *United States* v. *Oley*, 21 F. Supp. 281 (E. D. N. Y.).[11] Certainly neither the prior federal practice nor the overwhelming weight of state authority (both before and since the Criminal Rules were adopted) has recognized any broad right of pre-trial discovery in criminal cases.[12]

[11] See *Hofler* v. *State*, 16 Ark. 534; *State* v. *Hayes*, 127 Conn. 543, 18 A. 2d 895; *Cannon* v. *People*, 141 Ill. 270, 30 N. E. 1027; *Merrick* v. *State*, 63 Ind. 327; *State* v. *Gloyd*, 148 Kan. 706, 84 P. 2d 966; *Howard* v. *Comm.*, 118 Ky. 1, 80 S. W. 211; *Comm.* v. *Giacomazza*, 311 Mass. 456, 42 N. E. 2d 506; *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *State* v. *McDonald*, 342 Mo. 998, 119 S. W. 2d 286; *People* v. *Schainuck*, 286 N. Y. 161, 36 N. E. 2d 94, but cf. *People* v. *Miller*, 257 N. Y. 54, 177 N. E. 306; *Brown* v. *Comm.*, 90 Va. 671, 19 S. E. 447, but cf. *Mohler* v. *Comm.*, 132 Va. 713, 111 S. E. 454; *State* v. *Truba*, 88 Vt. 557, 93 Atl. 293.

[12] *United States* v. *Rosenfeld*, 57 F. 2d 74 (C. A. 2), certiorari denied, 286 U. S. 556; *Massie* v. *People*, 82 Colo. 205, 258 Pac. 226; *Padgett* v. *State*, 64 Fla. 389, 59 So. 946; *Newton* v. *State*, 21 Fla. 53; *People* v. *Schallman*, 295 Ill. 560, 129 N. E. 569; *Weer* v. *State*, 219 Ind. 217, 36 N. E. 2d 787; *State* v. *Jeffries*, 117 Kan. 142, 232 Pac. 873; *Wendling* v. *Comm.*, 143 Ky. 587, 137 S. W. 205; *State* v. *Williams*, 211 La. 782, 30 So. 2d 834; *Comm.* v. *Noxon*, 319 Mass. 495, 535, 66 N. E. 2d 814, 839; *Comm.* v. *Jordan*, 207 Mass. 259, 93 N. E. 809; *People* v. *Kuberacki*, 310 Mich. 162, 16 N. W. 2d 703; *State ex rel. Page* v. *Terte*, 324 Mo. 925, 25 S. W. 2d 459; *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *Hameyer* v. *State*, 148 Neb. 798, 29 N. W. 2d 458; *State* v. *Bunk*, 63 A. 2d 842 (Cty. Ct. N. J.); *People* v. *Gatti*, 167 Misc. 545, 4 N. Y. S. 2d 130; *State* v. *Di Noi*, 59

Petitioners have collected in an appendix to their brief excerpts from opinions in 33 criminal cases and 1 civil case concerning inspection of documents and other objects in the possession of the prosecution (Petitioners' Appendix 1–14). They have lumped together all types of inspection under all kinds of situations with the result that it is impossible to draw any conclusion from the material as presented. In an appendix to this brief, *infra*, p. 41, we have classified and analyzed petitioners' cases. That analysis reveals that in no case was a subpoena upheld which called, as does the present one, for a general disclosure of the prosecution's case.

When the Criminal Rules were being drafted, the Advisory Committee had before it, on the one hand, the absence of any substantial body of precedent approving the use of discovery in criminal cases (see *Shores* v. *United States*, 174 F. 2d 838, 844 (C. A. 8)), and, on the other hand, the example of the broad discovery procedures embodied in the recently adopted Civil Rules (*e. g.*, Civil Rule 34). The first draft of the discovery provision in the Criminal Rules reflected a decision to follow the Civil Rule pattern in fashioning a discovery device for use against the

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R. I. 348, 195 Atl. 497; *May* v. *State*, 129 Tex. Cr. R. 2, 83 S. W. 2d 338; *Abdell* v. *Comm.*, 173 Va. 458, 2 S. E. 2d 293; *State* v. *Payne*, 25 Wash. 2d 407, 171 P. 2d 227; *Santry* v. *State*, 67 Wis. 65, 30 N. W. 226. And see 2 Wharton, *Evidence in Criminal Cases* (11th ed., 1935) 1311–12; 23 C. J. S., Criminal Law, § 955; 17 Am. Jur., Discovery, § 25.

Government.[13] Proposed Rule 19 of the Preliminary Draft issued by the Advisory Committee in 1943 provided that

> the court may order the attorney for the government to permit the inspection * * * of any designated * * * documents, * * * not privileged * * *.

This proposed Rule was substantially identical (as applied to the Government) [14] with the provisions of Rule 34 of the Civil Rules then in effect, which made discovery applicable broadly to "any designated documents, * * * not

[13] It does not appear that there was any consideration given to permitting pre-trial discovery against defendants. The privilege against self-incrimination would presumably be a bar to such a procedure, except as applied to corporations. Moreover, the Government has available to it the inquisitorial powers of the grand jury.

[14] The note to the discovery provision in the preliminary draft contained the following paragraph:

"Compare Fed. Rules Civ. Proc., Rule 34 (Discovery and Production of Documents and Things for Inspection, Copying, or Photographing). See *United States* v. *Burr*, Fed. Cas. No. 14,692d, 14,694 (C. C. Va., 1807) (inspection of a letter). See also *United States* v. *Rich*, 6 Alaska 670 (1922) (inspection and photographing of a piece of glass supposed to contain the defendant's fingerprints); Wigmore, Evidence (3rd ed. 1940) § 1859g. Inspection has frequently been denied where the motion was regarded as *a "fishing expedition" or an attempt to force the government to disclose its case.* *United States* v. *Rosenfeld*, 57 F. (2d) 74 (C. C. A. 2d, 1932), cert. denied *Nachman* v. *United States*, 286 U. S. 556 (1932)." (Federal Rules of Criminal Procedure, Preliminary Draft (1943, p. 103. Emphasis supplied.)

The italicized portion of this note shows that even this broad provision was not intended to embrace the dragnet type of discovery here sought.

privileged." It represented a radical departure from existing practice.

The sweeping innovation represented by proposed Rule 19 met with resistance. See *Shores* v. *United States*, 174 F. 2d 838, 844 (C. A. 8). The urging of those who wished to provide for complete disclosure of the Government's case prior to trial was countered with the argument that the element of surprise should not be a weapon possessed only by defendants in criminal cases where the burden on the Government is heavy and the protections accorded to defendants many.[15] In the Second Preliminary Draft, issued

[15] Compare comment of Judge Yankwich in an article dealing with the proposed criminal rules (3 F. R. D. 209, 210–211):

"To some extent, a criminal prosecution, so far as the Government is concerned, is a one-sided proposition. In a complex society, in which those accused of crime have unbounded opportunity of avoiding detection and prosecution, the interests of society, in protecting itself against the anti-social forces, demands that some element of surprise be left. And I venture to say that *even the most liberal would not advocate, in the realm of criminal procedure, the broad means of discovery which the civil rules now embody* as an accepted policy." [Emphasis supplied.]

And see *People* v. *Gatti*, 167 Misc. 545, 547, 4 N. Y. S. 2d 130, 132.

Judge Learned Hand, in passing on a motion to inspect grand jury minutes, made the following general observation on pre-trial disclosure of the Government's evidence:

"Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he can-

by the Advisory Committee in February 1944, the proposed rule governing discovery and inspection (which in that draft was Rule 18) was shifted from the broad channels of the Civil Rules provision. It permitted discovery as to

> designated * * * documents * * * *obtained from or belonging to the defendant or constituting evidence in the proceeding,* * * *. [Emphasis supplied.]

In the rule finally adopted (Rule 16), the Advisory Committee narrowed the scope of discovery still further. Rule 16 allows discovery and inspection of the following categories of material:

> designated * * * documents * * * *obtained* from or *belonging* to the defendant or obtained from others by *seizure or by process,* * * *. [Emphasis suppiled.]

In the Advisory Committee's Note to Rule 16 (18 U. S. C. foll. 687) all reference to the Civil Rules is omitted, and the limited nature of the discovery to be permitted is stressed:

> Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States* v. *Rosenfeld,* 57 F. 2d 74, C. C. A. 2d, certiorari denied,

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not be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see." (*United States v. Garsson,* 291 Fed. 646, 649 (S. D. N. Y., 1923).

286 U. S. 556, 52 S. Ct. 642, 76 L. Ed. 1290. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States* v. *B. Goedde and Co.*, 40 Fed. Supp. 523, 534, E. D. Ill. The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, *on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution.* The entire matter is left within the discretion of the court. [Emphasis supplied.]

Thus the discovery provision underwent, in the course of its development through successive drafts, a transformation from a broad device to a limited one. In the Preliminary Draft (as Rule 19), it was very broad and was based upon Civil Rule 34. In the Second Preliminary Draft (as Rule 18), it was narrower, and in the rules actually adopted by this Court it appears in its present still more limited form. In the face of this history it is idle to look to the Civil Rules or to isolated pre-rules cases as authority for expanding the discovery authorized by Rule 16. In Point II, it is demonstrated that there is likewise no basis for achieving such a result by the subpoena route under Rule 17 (c).

II

THE LIMITS OF PRE-TRIAL DISCOVERY ESTABLISHED BY RULE 16 CANNOT BE EXPANDED BY A SUBPOENA AND ORDER TO PRODUCE UNDER RULE 17 (c)

Rule 17 (c) provides:

> (c) For Production of Documentary Evidence and of Objects.
>
> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. *The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.* [Emphasis supplied.]

Petitioners rely upon the italicized language as supporting the instant subpoena and order to produce. Even on its face it fails to do so, for Rule 17 (c) contemplates the production of materials which are "to be offered in evidence" whereas the subpoena required production of materials "whether or not they might constitute evidence." Beyond this, however, a reading of Rule 17 (c) in its setting discloses insuperable

difficulties with the construction which petitioners seek to place on it.

First, petitioners' construction creates a square conflict with Rule 16. It seems clear that the framers of the Rules would not have created in Rule 16 a privilege of discovery by motion for production carefully limited to documents taken from or belonging to the defendant, or taken from others by seizure or process, and at the same time have created in Rule 17 (c) an unlimited privilege of pre-trial discovery by the subpoena route. Nor would the framers have conditioned the privilege of discovery in Rule 16 upon a showing by the defendant that the items sought may be "material to the preparation of his defense" if at the same time Rule 17 (c) authorized unlimited discovery by subpoena, subject only to a motion to quash on the ground that "compliance would be unreasonable or oppressive."

Petitioners contend earnestly and at length that there is no conflict between the two rules as they interpret them (Petitioners' Br. 29–36), that Rule 17 (c) was "intended as a method of securing to defendants the right to have compulsory process in their favor" (Br. 31), while Rule 16 "is, in its origin and its effect, a limitation upon the powers of the prosecution rather than an affirmation of the rights of the accused" (*ibid.*). The fallacy in this analysis is that it dwells upon the asserted purposes of the two rules rather than

upon their concrete application. We may concede that the rules had differing purposes, but that fact does not aid petitioners. To describe one rule as limiting the prosecutor and another as helping the defendant may conceal but it cannot remove a conflict.

The question properly is whether a defendant may use a subpoena *duces tecum* under Rule 17 (c) to obtain discovery of materials which the express language and history of Rule 16 exclude from discovery. Under petitioners' interpretation of Rule 17 (c) the answer to this question is plainly in the affirmative. The present subpoena was drawn to cover only those materials which could not be procured under Rule 16.

As we have seen (*supra* pp. 25–26), the draftsmen of the Rules made a deliberate choice that the broad discovery permitted in civil cases should not obtain in criminal cases, and the defendant's ability to require the Government to divulge its case should be more narrowly circumscribed. Petitioners, in effect, would have this Court hold that the framers failed to make that choice effective and that they performed a useless act in placing careful limits on Rule 16. But more than this, the conclusion is compelled that Rule 16 itself serves no purpose. Petitioners suggest that Rule 16 "grants *additional privileges* to the defendant" (Petitioners' Br. 34). If the privileges in question are thought to be additional to

those conferred by Rule 17 (c), it is difficult to conceive what those additional privileges are. Under petitioners' sweeping interpretation of the subpoena privilege, there are no limits upon the power of a court to order pretrial production of documents under Rule 17 (c).[16] Since the conflict between the two provisions as petitioners interpret them is inescapable, petitioners must be contending that the general language of the subpoena provision prevails over the specific language of Rule 16. But a basic rule of statutory construction is to the contrary. Specific provisions in a statute or rule take precedence over general language. *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204; *Clifford F. MacEvoy Co.* v. *United States*, 322 U. S. 102.[17]

Petitioners also suggest that in relying upon Rule 16 we are seeking to impose limitations only upon the use of Rule 17 (c) against the Government, since Rule 16 is applicable only to the

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[16] Nor can any distinction be predicated upon the discretionary nature of Rule 17 (c). For Rule 16 is also a discretionary rule (*supra*, p. 17). If Rule 17 (c) is available as a pretrial discovery device, it is unlikely that a court in its discretion would deny access under Rule 17 (c) to documents as to which it would grant access under Rule 16.

[17] In the *MacEvoy* case the Supreme Court stated (322 U. S. at 107):

"However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' *Ginsberg & Sons* v. *Pokpin*, 285 U. S. 204, 208."

Government (Petitioners' Br. 44–45). But such is not the case. We agree that the scope of Rule 17 (c) is the same whichever party invokes it. We do contend that the limits of pre-trial discovery are established by Rule 16. Since one of those limits is that pre-trial discovery is only available in favor of defendants, it follows that pre-trial discovery against defendants is not permissible under Rule 17 (c).

Second, the sentence in Rule 17 (c) upon which petitioners rely does not, if read in context, suggest the creation of a broad discovery device. Rule 17 (a) (*supra*, pp. 2–3) provides for subpoenas *ad testificandum;* Rule 17 (c) provides that the subpoena "may also command the person to whom it is directed" to produce designated documents or other materials. When the two subdivisions are read together it is apparent that they are designed to authorize the traditional trial subpoenas by means of which witnesses may be summoned and may be required to bring documents with them to the trial or other proceeding. The novel provision for production of documents "prior to the trial or prior to the time when they are to be offered in evidence" does not alter the character of the subpoena. It permits advance production of *evidentiary* material which is to be *offered at the trial* by the party subpoenaing it, not advance production of all materials in the hands of the opposing party "whether or not they

might constitute evidence with respect to the guilt or innocence of any of the defendants" (cf. instant subpoena, *supra*, pp. 5–6).

The rule cannot reasonably be read as authorizing the court to require a general disclosure by a party of its entire case. A provision which in terms merely relates to the time at which a subpoena *duces tecum* is returnable, and the time at which the parties may be permitted to exercise the time-honored privilege of inspection of documentary materials prior to their actual receipt in evidence, should not be construed as a *carte blanche* authorization of broad pretrial discovery in the absence of any indication that it was designed so to be used.

The history of Rule 17 (c) shows that the provision on which petitioners rely was never conceived as a discovery provision. The genesis of Rule 17 (c) is found in Rule 20 of the Preliminary Draft (1943). The Advisory Committee's note to the draft rule states that the rule "applies to subpoenas *ad testificandum* and subpoenas *duces tecum* issued for attendance at a trial or hearing in the district courts, at hearings before United States commissioners, or to take depositions."[17] There is no suggestion that an

[17] Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 106. As there are no substantial changes in the language of the subdivision as it appears in the final rule, the notes to the original draft are apposite.

auxiliary discovery device was contemplated.[18] On the contrary, the sentence permitting the court to require production of documents prior to trial or prior to the time at which they are to be offered in evidence is explained as follows:[19]

> The last sentence provides for a method by which the court may permit either side to inspect subpoenaed documents or objects under the supervision of the court. It is inserted *in the interests of fairness* and for the *purpose of preventing delay during the trial*, particularly in cases where numerous documents may have been subpoenaed. [Emphasis supplied.]

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[18] Petitioners rely upon certain views of Professor Dession, 56 Yale L. J. 197, 221–222, in support of the contention that Rule 17 (c) was intended to permit subpoenas of the type here employed (Petitioners' Br. 26–28). An examination of the excerpt quoted from the Dession article, however, does not bear out the contention. Professor Dession refers to "a subpoena practice which permits of a sifting in advance of trial of the documents *actually to be offered in evidence*." (Emphasis supplied.) We concede that every document obtained in an evidentiary subpoena need not actually be offered at the trial, but the subpoena must represent a bona fide effort to obtain specific evidence which is expected to be offered. Unlike a grand jury subpoena (*Brown* v. *United States*, 276 U. S. 134; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541), it cannot be inquisitorial in purpose, nor can it be utilized for discovery. *American Tobacco Co.* v. *United States*, 147 F. 2d 93 (C. A. 6), affirmed on other grounds, 328 U. S. 781, is not to the contrary. The controversy there was over the right of the Government to inspect documents which had come into the possession and control of the court pursuant to valid trial subpoenas (147 F. 2d at 116). Cf. Petitioners' Br. 28.

[19] Federal Rules of Criminal Procedure, Preliminary Draft (1943), pp. 107–108.

The reference to the "purpose of preventing delay during the trial" indicates that the intended function of the provision for pretrial production was primarily to afford counsel an opportunity to exercise in advance of trial the rights which they unquestionably would have had at the trial to examine proffered evidence for authenticity and to determine whether to object to its introduction. The phrase "particularly in cases where numerous documents may have been subpoenaed" further shows that the inspection procedure is designed to give a party an opportunity to inspect subpoenaed evidence before the other party is on the point of introducing it, not to give the parties an opportunity to search each other's files by the subpoena route. If the purpose of the provision were that advanced by petitioners, the note might well have said, "particularly to permit the subpoenaing of all documents in the possession of the opposing party." The construction of Rule 17 (c) urged by petitioners thus is not only inconsistent with the express limitations on pretrial discovery found in Rule 16, but the very sentence of the rule upon which they rely was designed to permit inspection of evidence rather than to provide a device for acquiring it.

It is important for present purposes to distinguish between the object of ordinary trial process and that of discovery. In one sense every subpoena *duces tecum* is a discovery device unless the subpoenaing party is fully familiar with the

contents of each document listed. In other words a subpoena *duces tecum*, whether returnable at trial or before trial, enables a party to look at and discover the precise contents of documents. But discovery in the sense used by the framers of both Civil and Criminal Rules describes collectively the procedural devices by which a party may inquire into an opponent's case or ascertain the existence of evidence. It is the existence in the Civil Rules of this type of discovery which has ruled out, in civil cases, the "time-honored cry of 'fishing expedition' ". See *Hickman* v. *Taylor,* 329 U. S. 495, 507. It is apparently petitioners' contention that broad pretrial discovery is now applicable also in criminal procedure (Petitioners' Br. 36). But they are met with the decisive language and history of Rule 16 which show that, whatever the urging of the advocates of broad discovery, a more conservative view prevailed (*supra,* pp. 23–26). Petitioners therefore turn to Rule 17 (c) and argue in effect that because the provision does not in terms *forbid* a subpoena requiring a complete disclosure of an opponents' case, it must be construed to *permit* such a subpoena.

The fatal defect in this argument is that the subpoena described in Rule 17 (c) is the conventional trial subpoena *duces tecum* with the single novel element that the materials subpoenaed may be required to be produced prior to the time at which they are to be introduced in evidence even though the production may be prior

to trial. The traditional subpoena *duces tecum*, apart from grand jury of other inquisitorial subpoenas, is limited to specific materials to to which there was at least a reasonable showing of evidentiary character.[20] The present subpoena explicitly discards this test. Petitioners have cited many cases showing that under varying laws and circumstances courts have authorized the production of particular materials in the hands of the prosecution deemed essential to the preparation of the defense. The instant subpoena, however, is not of that character. It clearly represents an effort to secure a broad pretrial disclosure of the Government's case. Petitioners have not called for some specific document which might be crucial evidence in their defense. Compare *United States* v. *Burr*, 25 Fed. Cas. 30 (C. C. D. Va.); *Edwards* v. *United States*, 312 U. S. 473;[21]

[20] *Dancel* v. *Goodyear Shoe Machinery Co.*, 128 Fed. 753, 762 (C. C. Mass.); *Miller* v. *Mutual Reserve Fund Life Assn.*, 139 Fed. 864 (C. C. S. D. N. Y.); *United States* v. *Terminal R. Assn.*, 154 Fed. 268 (C. C. E. D. Mo.); *Hoppe* v *W. R. Ostrander & Co.*, 183 Fed. 786 (C. C. S. D. N. Y.); *General Finance Corp.* v. *New York State Rwys.*, 1 F. Supp. 381 (W. D. N. Y.); *United States* v. *Union Trust Co. of Pittsburgh*, 13 F. Supp. 286 (W. D. Pa.); *United States* v. *Balaban*, 26 F. Supp. 491 (N. D. Ill.); and see *American Car and Fdry. Co.* v. *Alexandria Water Co*, 221 Pa. 529, 70 Atl. 867; anno. 58 A. L. R. 1263.

[21] Petitioners suggest that Rule 17 (c) would not apply in the *Edwards* case situation under the decision below. This is patently erroneous since the *Edwards* case concerned an effort to obtain evidence for use "in the hearing on the plea in bar of the very foundation of the plea" (312 U. S. at 481). *Boehm* v. *United States*, 123 F. 2d 791 (C. A. 8) is in the

Boehm v. *United States*, 123 F. 2d 791 (C. A. 8). They have asked in effect to see the Government's files in this case. No case of which we are aware sanctions a comparable pretrial fishing expedition in a criminal case.[22]

In the few reported cases[23] arising under Rule 17 (c) which have actually considered the issue here, the courts have uniformly rejected attempts to convert the subpoena *duces tecum* into a broad discovery device. *United States* v. *Maryland & Virginia Milk Producers Association*, 9 F. R. D. 509 (D. D. C.); *United States* v. *Hiss*, 9 F. R. D. 515 (S. D. N. Y.); *United States* v. *Brumfield*,

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same category. Defendant was held entitled at the trial to get transcripts containing "evidence material to his defense" (123 F. 2d at 807).

[22] Petitioners seem to argue that the unusual procedure employed by them is justified as a substitute for a bill of particulars (Petitioners' Br. 62). It seems clear, however, that their right to a bill of particulars must be decided on its own merits. Certainly dragnet pre-trial discovery is not an appropriate way to ascertain with greater particularity the nature of the charge against defendants.

[23] In the unreported case of *United States* v. *Norman Littell and Lewis H. Marks* (S. D. N. Y., 1948), leave to file mandamus denied, *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2), the grounds on which the district court relied in reaching its decision cannot be ascertained since it filed no opinion. In the unreported opinion of November 10, 1949, in the case of *United States* v. *Hiss* (No. C128-402, S. D. N. Y.), it appears that a subpoena for certain specific documents had been served upon the Secretary of State and that he had complied with the subpoena to the extent of forwarding the documents to the court. In denying a motion to quash the district court stressed the fact that the subpoena had not been served on the attorney for the Government.

85 F. Supp. 696 (W. D. La.). *Maryland & Virginia Milk Producers Association* case, *supra*, is squarely in point. Defendants in that case sought a subpoena *duces tecum* directing the Government to produce all relevant documents which it had obtained from any person not a party to the proceeding whether by process or not. In denying this request, the court stated (9 F. R. D. at 510):[24]

> The purpose of this provision is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial. It is not intended as a discovery provision.
>
> In this case the proposed subpoena *duces tecum* is not intended to be used to secure evidence to be introduced at the trial, but is intended to be employed as a broad discovery for the purposes of inspecting all the documentary evidence in possession of the Government and which the Government intends to use at the trial.[25]

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[24] It can scarcely be argued that this case involves a "discretionary" ruling (cf. Petitioners' Br. 67). Indeed, the court stated, "in a criminal case, unlike a civil action, such a right of broad discovery does not exist" (9 F. R. D. at 510). And see *United States* v. *Brumfield*, *supra*, at 707, where it was held that Rule 17 (c) "is simply complementary to Rule 16 in providing for subpoena addressed to the party having possession of the documents, to produce them."

[25] If anything, the court's description indicates that the subpoena in that case was narrower than that in the present case in that it was limited to evidence.

The holding in *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2), relied upon by petitioners (Br. 65–66), was that a petition for leave to file a petition for a writ of mandamus should be denied. The bulk of the court's brief *per curiam* opinion was devoted to a discussion of the impropriety of the issuance of the extraordinary writ where the challenged action of the lower court is not subject to the appellate jurisdiction of the court of appeals.[26] As the court below held (R. 134), this opinion cannot "be construed as a considered determination as to the character of documents which a subpoena may include or the purposes for which it may issue."

The interpretation of Rule 17 (c) here urged and adopted by the court below does not, as the dissenting judge below thought (R. 139), read out the pretrial production provision of Rule 17 (c). It merely limits that provision to the sphere for which it was intended—the advance production of specific evidentiary material subpoenaed for use at the trial.[27] It prevents what

[26] It is true that the *per curiam* opinion stated that "The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the court's jurisdiction" (171 F. 2d at 644). At most, this statement imports a holding that for the purpose of mandamus the court would limit its inquiry to the question whether a district court has the power to issue a subpoena *duces tecum*.

[27] Thus in a murder prosecution the Government might have possession of the alleged murder weapon which the defense desired to offer at the trial. A subpoena under Rule

is basically a trial subpoena from being converted into a device for obtaining a broad pretrial exploration into the opposing party's case, not sanctioned by Rule 16 or precedent. The subpoena here at issue would not be valid as a trial subpoena. We submit that it cannot be sustained as a pretrial subpoena.

CONCLUSION

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted.

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17 (c) requiring production of the weapon might validly be ordered returnable prior to trial, although the weapon was not taken from the defendant or others by seizure or process. Or the letter in *United States* v. *Burr*, 25 Fed. Cas. 30, 37 (C. C. D. Va.) which "the accused believed to be essential to his defense, which may, for aught that now appears, be essential" could appropriately be subpoenaed prior to trial.

APPENDIX

Petitioners set forth in an appendix to their brief 33 criminal cases and 1 civil case which discuss discovery. As petitioners do not classify the cases by holdings, the impression created by the selected language quoted from the opinions is somewhat misleading. As the following analysis indicates, none of the cases is a precedent for the dragnet type of pretrial discovery attempted in the present case.

1. *Federal Criminal Cases.—United States* v. *B. Goedde & Co.*, 40 F. Supp. 523 (E. D. Ill.), holds that a defendant may have access to papers *taken from him*, and thus the case falls squarely within Rule 16. In fact, it is cited as a precedent in the Advisory Committee's note to the Rule (*supra*. p. 26; see Petitioners' Br. 32). It can scarcely be cited as authority for exceeding the limits of Rule 16.

United States v. *Warren*, 53 F. Supp. 435 (D. Conn.), permitted discovery broader than that provided under Rule 16 as adopted, but the court expressly relied upon the then current proposed version of the discovery and inspection rule which was subsequently discarded in favor of the present, more limited, Rule 16 (*supra*, pp. 22–25). See 53 F. Supp. at 436.

United States v. *Rich*, 6 Alaska 670, permitted discovery as to a specific piece of *evidence* deemed essential to the defendant's case—a piece of glass supposed to contain the defendant's fingerprints.

2. *State Criminal Cases.*—These cases fall into the following categories:

(a) Cases in which denial of discovery was sustained or granting of it was reversed.

State v. *Superior Court*, 39 Ariz. 242, 5 P. 2d 192.

Massie v. *People*, 82 Colo. 205, 258 Pac. 226.

Weer v. *State*, 219 Ind. 217, 36 N. E. 2d 787.

Padgett v. *State*, 64 Fla. 389, 59 So. 946.

Wendling v. *Comm.*, 143 Ky. 587, 137 S. W. 205.

Comm. v. *Noxon*, 319 Mass. 495, 66 N. E. 2d 814.

Comm. v. *Jordan*, 207 Mass. 259, 93 N. E. 809.

Hameyer v. *State*, 148 Neb. 798, 29 N. W. 2d 458.

Cramer v. *State*, 145 Neb. 88, 15 N. W. 2d 323.

People v. *Gatti*, 167 Misc. 545, 4 N. Y. S. 2d 130.

State v. *Morrison*, 175 Wash. 656, 27 P. 2d 1065.

(b) Cases approving inspection of particular objects or items as to which there is a showing of potentially crucial importance to the defense. Accord: *United States* v. *Rich*, *supra*.

Parsons v. *State*, 251 Ala. 467, 38 So. 2d 209.

People v. *Gerold*, 265 Ill. 448, 107 N. E. 165.

State v. *Lowery*, 160 La. 811, 107 So. 583.

State v. *Naething*, 318 Mo. 531, 300 S. W. 829.

Matter of Hughes v. *Kings County Court*, 181 Misc. 668, 41 N. Y. S. 2d 843.

People v. *Wargo*, 149 Misc. 461, 268 N. Y. S. 400.

People v. *Radeloff*, 140 Misc. 690, 252 N. Y. S. 290.

People v. *Bellows*, 1 How. Pr. N. S. 149.

State v. *Circuit Court of Minnehaha County*, 60 S. D. 115, 244 N. W. 100.

(c) Cases approving inspection of accused's statement or confession.

Jones v. *State*, 213 Ark. 863, 213 S. W. 2d 974.

State v. *Dorsey*, 207 La. 928, 22 So. 2d 273.

State v. *Haas*, 188 Md. 63, 51 A. 2d 647.

People v. *Rogas*, 158 Misc. 567, 287 N. Y. S. 1005.

(d) Cases permitting inspection of records of grand jury proceedings, coroner's inquests or special investigatory bodies in special circumstances.

Daly v. *Dimock*, 55 Conn. 579, 12 Atl. 405 (construed as public records).

People v. *Kresel*, 142 Misc. 88, 254 N. Y. S. 193.

State v. *Hinkley*, 81 Kan. 838, 106 Pac. 1088 (construed as public records).

(e) Cases as to which there is no indication from the report that the inspection involved was pre-trial in nature.

State v. *Bramhall*, 134 La. 1, 63 So. 603.

State v. *Tippett*, 317 Mo. 319, 296 S. W. 132.

3. *Miscellaneous cases.*—*Trustees of Schools* v. *American Surety Co.*, 307 Ill. App. 398, 30 N. E. 2d 513, is a civil case presumably included in petitioners compilation inadvertently. *Matter of Attorney General of United States*, 160 Misc.

533, 291 N. Y. S. 5, was not a discovery case. It involved an application by the United States in a state court for access to state grand jury minutes for use in a federal prosecution.

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